Supreme Court, U.S.
FILED
011103 DEC 8 2001
OFFICE OF THE CLERK

No._____

IN THE SUPREME COURT OF THE UNITED STATES

JAMES D. BOSWELL, Individually and on behalf of all others similarly situated; VANESSA LACE BOSWELL, Individually and on behalf of all others similarly situated; SHAUNA MROSKI, Individually and on behalf of all others similarly situated

Plaintiffs-Appellants-Petitoner

v

BOARD OF TRUSTEES TEXAS CHRISTIAN UNIVERSITY (individual members (in their official capacities only); GEORGE BUSH, Governor, individual and official capacity; DANIEL JAMES, Major General, Adjutant General of Texas, LOUIS CALDERA, Secretary of the Army, National Guard Bureau Agency,

Defendants-Appellees-Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS FORT WORTH

USDC No. 4:00 - CV-1526-Y, Fifth Circuit N0 00-11360 and USDC No. 4:98-CV-168-Y No-00-10698

PETITION FOR A WRIT OF CERTIORARI

James Douglas Boswell, Pro Se
414 Morrison Dr.
Euless TX 76039
817 358 9911

6988

(a) Supreme Court Issues

Argument I. Whether Defendants presented clear and convincing evidence to rebut prima facie case of retaliation with respect to performance appraisals, promotion and career status pursuant to Federal and Texas Whistle Blower Protection Act?

Argument II. Whether 42 U.S.C. 2000d-7 is a valid exercise of Congress's power under section V of the fourteenth amendment to remove Eleventh amendment immunity to suits under Title VI.

Argument III. Whether 42 U.S.C 2000d validly removes immunity from suits due to Section 2000d-7 clear statement and Congress meaning and condition of acceptance of federal financial assistance.

Argument IV. Whether a court abuses discretion when new evidence of compelling nature warrants justification to vacate trial court summary and final judgment, a new trial, and leave to supplement the record.

Argument V. Whether the Doctrine of Res Judicata carries precedence over other doctrines e.g. the doctrine of administrative remedy, doctrine of foreseeability, doctrine of continuing violation and just compensation for constitutional and statutory violations.

Argument VI. Whether a military service member may be entitled to exceptions to Feres Doctrine for good cause when the doctrine fundamentally conflicts with the statutes.

Argument VII. Whether the court abused discretion for dismissal on grounds of lack of jurisdiction and grounds the claim is time barred.

Argument VIII. Whether the court ruled properly on whether appellants have stated a claim for which relief could be granted.

Argument IX. Whether the court recognizes an inherent unfairness and conflict of interest and whether new evidence may vacate a prior ruling.

CERTIFICATE OF INTERESTED PARTIES

(1) A. Number of the case and style Civil Action **N0 00-11360, In The U.S. Court of Appeals For Fifth Circuit**

JAMES DOUGLAS BOSWELL, VANESSA LACE BOSWELL, SHAUNA MROSKI, Individually and on behalf of all others similarly situated PLAINTIFFS -APPELLANTS

VS

BOARD OF TRUSTEES TEXAS CHRISTIAN UNIVERSITY, Individual members (in their official capacity only); GEORGE BUSH, Governor, individual and official capacity; DANIEL JAMES, Major General, Adjutant General of Texas; LOUIS CALDERA, Secretary of the Army, National Guard Bureau Agency DEFENDANTS - APPELLEES

THE NORTHERN DISTRICT OF TEXAS FORT WORTH USDC No. 4:00 - CV-1526-Y Whistle Blower and Federal Discrimination Case based on retaliation.

1 B. Number of the case and style Civil Action **N0 00-10698, In The U.S. Court of Appeals For Fifth Circuit**

James Boswell Plaintiff

verses

Donald H. Rumsfeld, The Secretary of Defense; ET AL

Texas Christian University; William E. Tucker; Dr. , Chancellor;

Michael D. McCracken Dean

THE NORTHERN DISTRICT OF TEXAS FORT WORTH USDC No. 4:98 - CV -168-Y

Whistle Blower and Federal Discrimination Case based on retaliation.

(2) **JAMES DOUGLAS BOSWELL, VANESSA LACE BOSWELL, SHAUNA MROSKI** have an interest because they sustained injury from defendant's actions. Each of the plaintiff's provided sworn affidavits concerning violation of constitutional rights, and damage.

(3) Defendants have an interest in this case. **BOARD OF TRUSTEES TEXAS CHRISTIAN UNIVERSITY, GEORGE BUSH, Governor, of Texas; DANIEL JAMES, Major General, Adjutant General of Texas; LOUIS CALDERA, Secretary of the Army, and the Chief of the National Guard Bureau Agency.** Donald H. Rumsfeld, The Secretary of Defense; Texas Christian University; William E. Tucker; Dr. , Chancellor;

Michael D. McCracken Dean The senior leadership of the Army, the National Guard Bureau, and Texas Adjutant General had a role in reprisal, retaliation, and in conspiracy.

(4) The District court has prejudice this case by threat of sanction: "Plaintiffs are cautioned that they may be sanctioned if they make any future attempts to litigate these claims in this court". As result, James Boswell feared that exercising a judicial right to file a petition of review of the Secretary of the Army's final administrative order, dated 6 December 2000, would result in additional retaliation. Plaintiffs assert abuse of court discretion and prejudicial effect. The District Court orders, and the Agency Final order, give the appearance depriving plaintiffs of the constitutional protections provided by the First and Fifth amendments and impartiality of the adjudicators for denying formal evidential hearings. Texas Christian University's affiliation with Judge Means, concerning the University's violation of law and Title IX statutes, and The Army Board's affiliation with the Secretary of the Army's, gives an appearance that defendant interest have circumvented the interest of the community, the public, and all individuals harmed in the process of retaliation. Had the Honorable Judge and the Army Board for Correcting Military Records required just compensation, subsequent to reviewing the records, records where defendants affirmation of retaliation conduct is undisputed, this may have removed the doubt of impartiality which currently prevails. This is not intended to be disrespectful to this Honorable Judge or any one else in the community. In whistle blower cases there is a community bonding. With a federal government employee, as plaintiff learned in a hard way, the reality is that redress of grievance is a right by name only. Erring this concern with this Honorable Judge was an intended priority given opportunity to meet with him during the requested hearings and one of the basis for requesting recusal.

(5) Connection and Interest. Internal and external forces exist to give Texas Christian University and the Army and advantage as already documented and complained about in the court record. Realistically, Texas Christian University has the power, money, clout and know how to insure the success of combining all these interests behind their own aim, and likewise, so does the senior leadership of the Army. Similarly, there is an inherent bias when the Army does an investigation on itself, or when an agency Board is formed to review an agency action. The

United States Supreme Court is requested to exercise equitable power of the court to remedy the plaintiff's perception of bias. Attorney for Record for Texas Christian University Defendants is Richard De Berry, McDonald and Sanders, 1300 Continental Plaza, 777 Main Street, Ft Worth Texas 76102 and for United States Defendants is Wayne Hughes, Jr. Assistant United States Attorney, 801 Cherry St. Suite 1700, Ft Worth Tx 76102-6897, and for Texas Government employees, Mr. Peter J. Strelitz, Capitol Station, PO Box 12548, Austin Texas, 78711-2548.

Request for Oral Argument

Oral Argument is requested. Appellant request to appear personally before this body and will perform in the same manner as before the Army Discharge Review Board. The Texas Veterans Commission states "From an institutional memory standpoint we have represented 250 cases. Army and Texas Christian University Authorities have substantially denied our client fue process. Recommend full relief. Texas Labor code Title 2, subtitle A, Chapter 21 Section 21.055 states an employee commits an unlawful employment practice if the employee retaliates or discriminates against a person who opposes a discriminatory practice, makes or files a charge, files a complaint, or testifies, assists or participates in any manner in an investigation, proceeding, or hearing. Appellant will show that he engaged in a statutorily protected activity, that the employer took an adverse personnel action, and that a casual connection existed between the two. ***Carney v. Amercian Univ., 151 F.3d 1090, 1095 (D.C. Cir 1998).*** Oral argument will be particularity be useful for the court's understanding of what military whistle blowers must face when faithfully executing the government's oath. In twenty minutes, appellant will efficiently brief systemic flaws and will answer candidly the intriguing questions for the Court and this will be useful in compensation for defamation of character.

James D. Boswell
Pro se
414 Morrison Drive
Euless TX 76039
817 358 9911

(c) TABLE OF CONTENTS

	PAGE
(a) SUPREME COURT ISSUES	ii
(b) INTERESTED PARTIES	iii
(c) TABLE OF CONTENTS & CITED AUTHORITIES	vi
(d) ORDERS TO BE REVIEWED	xxi
(e) STATEMENT OF JURISDICTION	xxii
(f) CONSTITUTIONAL PROVISIONS	xxiii
(g)STATEMENT OF THE CASE	1
FACTS MATERIAL TO JUDGEMENT & BASIS FOR TRIAL COURT JURISDICTION	4
STATEMENT OF RELATED CASES, CORSE OF PROCEEDINGS, AND DEPOSITION OF THE CASE	8
SUMMARY OF ARGUMENT	10
ARGUMENT AND AUTHORITES	13
I. Whether Defendants presented clear and convincing evidence to rebut prima facie case of retaliation with respect to performance appraisals, promotion and career status pursuant to Federal and Texas Whistle Blower Protection Act?	14
II. Whether 42 U.S.C. 2000d-7 is a valid exercise of Congress's power under section V of the fourteenth amendment to remove Eleventh amendment immunity to suits under Title VI.	19
III. Whether 42 U.S.C 2000d validly removes immunity from suits due to Section 2000d-7 clear statement and Congress meaning and condition of acceptance of federal financial assistance.	22
IV. Whether a court abuses discretion when new evidence of compelling nature warrants justification to vacate trial court summary and final judgment, a new trial, and leave to supplement the record.	26

TABLE OF CONTENTS (CONTINUED)

V. Whether the Doctrine of Res Judicata carries precedence over other doctrines e.g. the doctrine of administrative remedy, doctrine of foreseeability, doctrine of continuing violation and just compensation for constitutional and statutory violations. 26

VI. Whether a military service member may be entitled to exceptions to Feres Doctrine for good cause when the doctrine fundamentally conflicts with the statutes. 27

VII. Whether the court abused discretion for dismissal on grounds of lack of jurisdiction and grounds the claim is time bared. 30

VIII. Whether the court ruled properly on whether appellants have stated a claim for which relief could be granted. 32

IX. Whether the court recognizes an inherent unfairness and conflict of interest and whether new evidence may vacate a prior ruling. 35

(h) REASONS FOR ALLOWANCE OF WRIT
CONCLUSION AND SUMMARY 38

APPENDIX

ADDENDUM A - Court of Appeals order dated 11 September 2001 (00-10698)
ADDENDUM B - Court of Appeals order dated 11 September 2001 (00-11360)
ADDENDUM C - Index to supplemental Appendix
CERTIFICATE OF COMPLIANCE
CERTIFICATE OF SERVICE

CITED AUTHORITIES

	Page number
Angela Moris and Stacy Handley v Regents of the University of Colorado N0 96-1555	5
Anna Mae Walsh Burke, Qui Tam: Blowing the Whistle for Uncle Sam, 21 Nova L. Rev. 869, 871 (1997	34
Alden v. Maine, 527 U.S. 706, 755 (1999)	24
ABCMR case AR20000045750 25 July 2000	
Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985)	22
Asher Rubinstein versus Administrators of the Tulane Educational Fund 5th Cir 98-30777, July 6, 2000.	31
Adkins v. United States, 68 F.3d 1317, 1321 (Fed. Cir. 1996)	12
Bob Jones University v United States, 461 U.S. 574	40
Bond v United States N0 95-441C filed September 12, 2000	4
Bulington Industries v Ellerth 118S.Ct 2257 (1998)	37
Burd v. United States, 19 Ct. Cl. 515 (1990)	10
Brannon v. Boatmens First Nat. Bank of Okla., 153 F.3d 1144, 1148, n. 4 (CA10 1998)	34
Brown v. CSC Logic, Inc., 82 F.3d 651, 655 (5th Cir. 1996)	28
Baltimore & Ohio R. Co. v. United States, 261 U.S. 592, 597, 43 S. Ct. 425, 426-427, 67 L. Ed. 816 (1923).	13

Bobula v. United States Department of Justice, 970 F.2d 854, 859 (Fed. Cir. 1992). 10

Breax v. City of Garland v.205F.3d 5th Cir 2000 14 36

Board of Educ. v. Kelly E., 207 F.3d 931, 935 (7th Cir.) (addressing same language in 20 U.S.C. 1403), cert. denied, 121 S. Ct. 70 (2000) 24

Bohic v. Department of Agriculture 25 April 2000 Fed Court of Appeals 32

Couveau v American Airlines 9955032, CV-97-06731-JSL, July 17, 2000 33, 37

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct 2548, 2552 (1986) 32, 27

Cunningham v U.S.A. No. 97-499C, (Filed January 12, 1998), 12

Casey v. United States, 8 Ct. Cl. 234 (1985)), restoration to military office 10

Cannon v. University of Chicago, 441 U.S. 677, 705-706 (1979) 8

Chaiken v. VV Publ'g Corp. , No. 95-9301, 1997 WL 403511, 2d Cir. July 21, 1997 32

Click 970 F.2d at 109. 3

Cedric Kusedric Kushiner Promotions LTD. v. King No. 00549 2nd Cir April 18, 2001, 33

City of Boerne v. Flores, 521 U.S. 507, 517 (1997) 20

City of Boerne, 521 U.S. at 532) 20

City of Boerne, 521 U.S. at 536 21

Carla Thomas v U.S.A. N0 98-770C filed 31 July 2000. 4

Carr v. Soc. Sec. Admin., 185 F.3d 1318, 1322 (Fed. Cir. 1999) 13

Callahan v. United States 00-538 C 33

Clark v. California, 123 F.3d 1267, 1271 (9th Cir. 1997) 24
(Section 504), cert. denied, 524 U.S. 937 (1998)
College Sav. Bank v. Florida Prepaid Postsecondary Educ. 24
Expense Bd., 527 U.S. 666, 686 (1999).
Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986) 26
Duke v. University of Texas at El Paso, 729 F.2d 994 (5th Cir. 1984)
Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 188 F.3d 278 5th Cir. 1999) 29
Deffenbaugh-Williams, 156 F.3d at 597 30
DIAZ case AC9505686 published 19 February 1997 28
Ex parte Virginia, 100 U.S. (10 Otto) 339 (1879) 21
Employment Discrimination Litigation Against Alabama, 198 F.3d 1305, 22
1321-1322 (11th Cir. 1999)
Essenberg, 988 S.W. 2d at 189 27
Felder D.C UAL Corporation 9th cir appeal 98-3551 and 37
Faragher v. City of Boca Raton, 118 S.Ct. 2275 (1998) 37
First Jersey Sec., 101 F.3d at 1464 32
Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 76 (1992) 8
Florida Prepaid Postsecondary Educ. Expense Bd. v. College 21
Sav. Bank, 527 U.S. 627, 629 (1999).
Geiserman v. MacDonald, 893 F.2d 787, 789 (5th Cir.1990) 13
Gant v. United States, 18 Cl. Ct. 442 (1989) 10
Griggs, 170 F.3d at 880 32

Gant v. United States, 18 Cl. Ct. 442 (1989) 31

Grubka v. Dep't of Treasury, 858 F.2d 1570, 1574 (Fed. Cir. 1988) 19

Hodges v. United States, 597 F.2d 1014, 1018 (5th Cir.1979) 13

Hodges v Callaway 499 F.2d 417, 420 (5th Cir 1974) 3

Hambsch v. Dep't of Treas., 796 F.2d 430, 436 (Fed. Cir. 1986) 18

Hillen v. Dept of the Army, 35 M.S.P.R. 453 (1987) 19

Hambsch, 796 F.2d at 436 19

Hercules Inc. v. United States, -- U.S. --, 116 S. Ct. 981, 985 (1996) 13

Jim C. v. Arkansas Dep't of Educ., 235 F.3d 1079, 1081-1082 (8th Cir. 2000) (en banc) (Section 504) 23

Jackson v Van Winkle, 660 S.W. 2d 807, 809 37

Johnson v. University of Cincinnati, 215 F.3d 561, 571 (6th Cir.) (upholding abrogation for race discrimination claim under Title VII of the Civil Rights Act), cert. denied, 121 S. Ct. 657 (2000) 22

Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., 46 F.3d 258, 265, 269 (CA3 1995) 34

Kindred v United States 499 F.2d 417, 420 (5th Cir. 1974) 5

Kolstad, 119 S.Ct. at 2127 29

Krystek v. Univ. of S. Miss., 164 F.3d 251, 256 (5th Cir. 1999) 27

Kennedy v. United States, 5 Cl. Ct. 792, 793 (1984) 12

Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 644 (2000) 20

Larson v USA 00-3041 Aug 14, 2001, page 7 21

Long v. Eastfield College, 88 F.3d 300, 305 n.4 (5th Cir. 1996) 29

Long, 88 F.3d at 305 29

Little Rock Sch. Dist. v. Mauney, 183 F.3d 816, 831-832 (8th Cir. 1999) 24

Lane v. Peña, 518 U.S. 187, 198 (1996) 22

Lesage v. Texas, 158 F.3d 213, 217 (5th Cir. 1998)528 U.S. 18 (1999) 22

Litman v. George Mason University, 186 F.3d 544, 554 (1999), cert. denied, 120 S. Ct. 1220 (2000) 23

Manning , 953 F.2d at 1360 32

Murphy v. United States, 16 Cl. Ct. 385 (1989)), placement in correct retirement status. 31

McDaniel v. Temple Indep. Sch. Dist., 770 F.2d 1340, 1346 (5th Cir.1985) 29

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973) 28

McKleskey v. Kemp, 481 U.S. 279, 298 (1987) 21

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 26

Murphy v. United States, 16 Cl. Ct. 385 (1989) 10

Mitchell v. United States, 930 F.2d 893, 896 (Fed. Cir. 1991) 10, 11

McGILL v USA, 97-769C filed November 16, 1998. 10

Mintzmeyer v Department of Interior 95- 3665 May 16 1996 33

National Organization for Women, Inc. v. Scheidler, 510 U.S. 249, 259 (1994) 34

Nelson v. City of Irvine, 143 F.3d 1196, 1200 (9th Cir. 1998). 40

Price Waterhouse v.Hopkins 490 U.S. 228 91989) 29

Pushkin v. Regents of the Univ. of Colo., 658 F.2d 1372, 1381 (10th Cir. 1981) 8

Pederson v. Louisiana State Univ., 213 F.3d 858, 875-876 (5th Cir. 2000) (Title IX) 37

Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275 (1959) 24

Pederson v. Louisana Stat Univ. 201F. 3d 388, 406 (5th cir. 2000) 23

Robinson v. United States of America to the United States Court of Appeal for the 10th Circuit Nos 00-3315 and 00-3332 19

Reeves, 530 U.S. at 143-46; 27

Russell, 235 F.3d at 229 & n.19 27

Reeves, 530 U.S. at 149 27

Russell v. McKinney Hosp. Venture, 235 F.3d 219, 226-27 (5th Cir. 2001). 30

Richmond v. Nationwide Cassel L. P., 52 F.3d 640, 647 (CA7 1995) 34

Restatement (2nd) of Judgments § 26(1)(c) cmt. c (1982)). 31

Reves v. Ernst & Young, 507 U.S. 170, 185 (1993) 34

Roberson v. Principi Fed Cir May 29 2001 31

Riley v St. Lukes Episcopla Hospital No. 97-20948, 5th cir, May 25, 2001 34

Russell, 193 F.3d at 306 35

Reeves v Sanderson Plumbing Products, Inc., 2000 WL 743663, 5.. 28

Sever v. Alaska Pulp Corp., 978 F.2d 1529, 1534 (CA9 1992) 34

Stevens, 529 U.S. at 848 34

Springer v. Philippine Islands, 277 U.S. 189, 202 (1928) 34

(Skinner, Sanders, Yee v. United States, 512 F.2d 1383, 206 Ct. Cl. 388 (1975) 31

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) 19

South Dakota v. Dole, 483 U.S. 203 (1987) 25

Singleton v. Merit Systems Protection Board 25 Apr 2001 31

School Bd. of Nassau County v. Arline, 480 U.S. 273, 286 n.15 (1987) 25

Sanders v. United States, 594 F.2d 804, 810 (Ct. Cl. 1979) 12

Sherrod v. American Airlines, Inc., 132 F.3d 1112, 1122 (5th Cir. 1998). 13

Sutton v. United States, 256 U.S. 575, 581 (1921)

Skinner v. United States, 594 F.2d 824, 219 Ct. Cl. 322 (1979) 10

Sanders v. United States, 594 F.2d 804, 219 Ct. Cl. 285 (1979) 10

Stanley Larson v Department of the Army, United States 14
Court of Appeals for the Federal Circuit, 00-3041, August 14, 2001

Stanley v. Litscher, 213 F.3d 340, 344 (7th Cir. 2000) (Section 504) 23

Shackelford v. Deloitte & Touche, LLP, 190 F.3d 398, 404 (5th Cir. 1999) 27

Sandoval v. Hagan, 197 F.3d 484, 493-494 (11th Cir. 1999) (Title VI), 24
cert. granted on other grounds121 S. Ct. 28 (2000) (No. 99-1908)

Texas Dept. of Human Services v. Green, NO. 3-92-059-CV, (Tex. 37
App.—Austin, 1993, n.w.h.), at pg. 8 of the opinion.

Texas Dept. Of Human Resources v. Green No 3-92-059-CV 36
(Tex. App.Austin 1993, n.w.h)

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) 28

Trauma Serv. Group v. United States, 104 F.3d 1321, 1325 (Fed. Cir. 1997). 13

Travis v. Bd. of Regents of Univ. of Texas, 122 F.3d 259 (5th Cir. 1997) 13

Tabb Lakes, Ltd. v. United States, 10 F.3d 796, 802-03 (Fed. Cir. 1993). 12

USA v Fed INS NO 99- 35881 (9th Cir Aug 7, 2001) 31

Union Pacific Railroad Co. v. Utah, 198 F.3d 1201, 1209 (10th Cir. 1999) 20

United States v. Sherwood , 312 U.S. 584, 586 , 590 (1941) 40

United States Dep't of Transp. v. Paralyzed Veterans of Am. 477 U.S. 597, 605 (1986) 23

United States v. Bestfoods, 524 U.S. 51, 6162 34

United States v. Turkette, 452 U.S. 576, 591 Vermont Agency of Natural Res. v. 34

United States ex rel. Stevens, 529 U.S. 765, 848, 120 S. Ct.

Von Hoffburg v. Allexander 615, F.2d 633, 637 -38 95th cir 1980 3

Vermont v United States ex rel Stevens, 529 U.S. 765,848, 120S 2d 836 (2000) 35

Wright v. U.S. Postal Serv., 183 F.3d 1328, 1334 (Fed. Cir. 1999) 19

West Department of Veteran Affairs v Gibson 14 June 1999 N0 98-238 36

Walker v United States N). 759 C Federal Court of Claims filed 7 April 1998, 5

Ward v. Bechtel Corp., 102 F.3d 199, 202 (5th Cir. 1997)

Willis v. Marion County Auditor's Office, 118 F.3d 542, 547 (7th Cir. 1997) 30

Yee v. United States, 512 F.2d 1383, 206 Ct. Cl. 388 (1975) 10

Zentgraf v Texas A & M , 492 F. Supp 265 (S.D. Tex 1980), 1858, 146 L. Ed. 2d 836 (2000). 5

United State Codes

	Page Numbers
5 U.S.C. § 7703(c) (1994).	*13,18*
5 U.S.C. § 1221(e) (1994))	*13*
5 U.S.C. § 2302 (b)(8) (1994)	*18*
5 U.S.C. § 2302(a)(2)(A)(viii) (1994)	*18*
5 U.S.C. code chapters 33, 43,51, 53, Subchapter III	*26*
10 U.S.C. Section 1034	*5*
10 531.10 U.S.C. 1552	*11*
18 U.S.C 371	*26*
18 U.S.C. 1956 (a) (1)	*26*
18 U.S.C. 1961 et seq., 1962(c) Rico 1962(c)s and 1961(3).(4)	*34*
18 U.S.C. section 287	*26*
18 U.S.C. & 241	*5*
28 U.S.C. 1343	*5*
28 U.S.C. § 1491(a)(2) (1994)	*10*
29 U.S.C. 1109; 2615	*5,9*
31 U.S.C. 3716, 3729, 3730, 3803, 3804, 3805, 3806, 3808	*26*
32 CFR & 562.4 (e)	*5,40*
32 CFR 588.26	*5*
37 U.S.C. § 204 (1994)	*10,11*
42 U.S.C. & section 2000e 16 (c)	*36*
42 U.S.C. 2000d-7	*19*

42 U.S.C. § 2000e-3(a) 33

42 U.S.C. § 2000d-7 2000d-7(a)(1) 20

42 U.S.C. § 1981 9,26

42 U.S.C. 2000d 9

42 U.S.C. § 2000e 9,26

42 U.S.C. §2000e-2(m) (Section 107 29

42 U.S.C. Section 1985 6

42 U.S.C. 1981 and 2000e-5 26

Public Laws

Public Law 100-456 codified at section 1034 of Title 10 10

Public law 103-353 (108 stat. 3158) paragraph 4314 10

Public Law 100-456 codified at section 1034 of Title 10 11

and 102-190 implemented by section 5 of the fourteenth amendment

DOD Directives

DD 5505.5 para 2, Para 4.3, 4.3.3 26

DoD Directive 7056.60 11

DoD Directive 1332.28, 11

DoD Directive 5505.5 22

Constitutional Amendments

First Amendment 12

Forth amendment 12

Fifth amendment 13

Eleventh amendment 19

Thirteenth amendment 13, 26

Equal Protection Clause and Due Process Clause of the Fourteenth Amendment 32,20, 21

Section 5 of the Fourteenth Amendment 19

Take Care Clause 34

Applicable Doctrines

Doctrine of foreseeability 26

Doctrine of Res Judicata 26

Continuing violation doctrine 37

Feres Doctrine 27

Doctrine of Administrative Remedy **3,31**

Constitution References

Spending Clause, Art. I, § 8, Cl. 1 24

Article II of the Constitution .S. Const. art. II, § 3 34

Article III 34

Fifth amendment taking 27

Texas Education Code, Sec 61.001 40

Title IX of the Education Amendments 23

Federal Rules of Civil procedure

Fed R. Civ. P. 56(c) and Rule 56(e) 27

Fed. R. Civ. P. 15(c) 32

Fed. R. Civ. P. 56(c) 28

FRCP Rule 9b 35

Federal Rules of Criminal Procedure, rule 6(e).

Statutes

Title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.] 14,22

Title VII of the Civil Rights Act 14,22

Title IX of the Education Amendments of 1972 [20 U.S.C. 1681 et seq.] 8,22

Texas Title II retaliation claims 33

Government Acts

Civil Remedies Act of 1986, October 1986, 26

Texas Whistle Blower Protection Act of 1983 17

Whistleblower Protection Act ("WPA"). 103 Stat. 16 (1989) 16

(codified in scattered sections of 5 U.S.C. and section 1034.

Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 14

103 Stat. 16 (1989) (codified in scattered sections of 5 and 10 U.S.C.).

Soldier and Sailors Civil relief Act of 1950 16

Corrupt Organizations Act 33

Railroad Revitalization and Regulatory Reform Act 20

False Claims Act ("FCA") 34

Civil Rights Act of 1964 8

Miscellaneous resources

DOD IG web site, http://www.dodig.osd.mil/audit/reports/index.html	*37*
Whistle Blower statistics April thru Sep 2000 (the latest publish report)	
DOD Military Whistle Blower Investigation H94L56226017. (July 1995)	*1*
Office of Special Counsel case N0 MA 99-1931	*4*
University Handbook for Faculty and University Staff and grievance policy	
Army Regulation 15-185	*27*
House Representative Bill 169	*32*
Senate legislation S-995	*33*
22 Weekly Comp. Pres. Doc. 1421 (Oct. 27, 1986), reprinted in 1986 U.S.C.C.A.N. 3554	*23*
EEOC complaint T 0279 TX A-04-99-L	*4*
OSC Complaint MA 99-1931	*4*
Federal Labor Complaint	*6*

(d) Orders to be Reviewed

Boswell II (USDC 4:00 CV-1526 Y) was filed 5 September 2000, in the Federal District Court of Texas on the hills of Boswell 1 USDC 4:98 CV- 168 Y filed 23 February 23 1998. Boswell I and Boswell II commences TORT and punitive damage action against said defendants. In Boswell 1, Boswell motioned to reopen the case due to evidence acquired through late FOIA and acquisition of the final agency order and two government letters to sue. Motion was denied. So a new suit was filed - Boswell II - alleges that Title VI of the ***Civil Rights Act of 1964, 42 U.S.C. 2000d***, prohibits any "program or activity receiving Federal financial assistance" from "subject[ing] to discrimination" any person "on the ground of race, color, or national origin." By dismissing with prejudice Boswell I and Boswell 11, the court shielded the state actors. Yet the state shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of Title IX of the Education Amendments of 1972 [20 U.S.C. 1681 et seq.]and title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance. Because of the new evidence of conspiracy (addendum 3, page 10-36) Boswell plead that Boswell 1 be reopened. Boswell II (was assigned to Judge Means in Boswell 1), a new case was filed, with documentation for exhausting all administrative remedy against a more complete, accurate, and a more comprehensive list and **different actors**, but it too was dismissed claiming res judicata. On the same day, 11 September 2001 Boswell 1 and Boswell 11 embanc considerations were denied. Boswell 1 has resulted in request for EnBanc appeal N0 00 10698 (addendum 1) . Boswell 11 has resulted in request for EnBanc appeal N0 00-11360 (addendum 2).

(e) Statement of Jurisdiction

Date of judgment. The 5th Circuit Court of Appeals denied appellants petition for rehearing enbanc on 11 September 2001. The enbanc petitions and orders are contained in the appendix at addendum 1 and at addendum 2. Appellants timely appeal.

Jurisdiction. The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1)

(f) CONSTITITUIONAL AND STATUTORY PROVISIONS INVOKED

Defendants violated the Statutory Tort provisions Prosser and Keeton 12 Infliction of mental stress; 36 Violation of a Statute; 91 Interference with use and enjoyment of private property; 92 Breech of contract; 102 Contributory negligence; 105 Misrepresentation; 111 Defamation; 112 Libel and slander; 121 Abuse of process; 124 interference with family affairs; 125 injury to members of the family; 130 Interference with perspective advantage; Undermining Public Policy; Common Law of expressed Contracts; Unlawful Retaliation

Defendants violated Texas Title II and the Texas Whistle Blower Act and *Whistleblower Protection Act ("WPA"). 103 Stat. 16 (1989) (codified in scattered sections of 5 U.S.C. and section 1034. Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (1989) (codified in scattered sections of 5 and 10 U.S.C.) and components of 18 U.S.C (conspiracy) 28 U.S.C, 29 U.S.C., 31 U.S.C. 32 CFRs, 37 U.S.C. concerning pay and 42 U.S.C. (wide spread discrimination). Specifically Defendants violated Public Law 100-456 codified at section 1034 of Title 10 , Public law 103-353 (108 stat. 3158) paragraph 4314, Public Law 100-456 codified at section 1034 of Title 10 and 102-190 implemented by section 5 of the fourteenth amendment Appellants show the lack of compliance with the following* ***DOD Directives*** *DoD 5505.5 para 2, Para 4.3, 4.3.3, DoD Directive 7056.60, DD Directive 1332.28, and disregard for* ***Constitutional Amendments of the*** *First Amendment, Forth amendment, Fifth amendment, sixth amendment Eleventh amendment, thirteenth*

amendment, Equal Protection Clause and Due Process Clause of the Fourteenth, Amendment, Section 5 of the Fourteenth Amendment and Take Care Clause. Appellants will apply the Doctrine of foreseeability, Doctrine of Administrative Remedy, Continuing violation doctrine and challenge Doctrines of Res Judicata and Feres Doctrine by showing violations of Spending Clause, Art. I, § 8, Cl. 1, Article II of the Constitution .S. Const. art. II, § 3, Article III, Fifth amendment taking , Texas Education Code, Sec 61.001, Title IX of the Education Amendments. Specifically defendants violated the Title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.Title VII of the Civil Rights Act Title IX of the Education Amendments of 1972 [20 U.S.C. 1681 et seq.]Texas Title II retaliation claims Appellants plead the defendants violated the following ***Government Acts:*** *Civil Remedies Act of 1986, October 1986, Texas Whistle Blower Protection Act of 1983,Soldier and Sailors Civil Relief Act of 1950, Crrupt Organizations Act, False Claims Act ("FCA"), and the Civil Rights Act of 1964. Via theDOD Military Whistle Blower Investigation H94L56226017. (July 1995), Office of Special Counsel case N0 MA 99-1931, EEOC complaint T 0279 TX A-04-99-L, the University Handbook for Faculty and University Staff and grievance policy, and Army Regulation 15-185, House Representative Bill 169, Senate legislation S-995, and Fderal Labor Complaint, appellants will earn a favorably ruling.*

STATEMENT OF THE CASE

September 11 2001 was the most tragic day America has witnessed. The military service member not only suffered the lost of comrades, friends, leaders but lost two legal related defeats in the 5th Circuit Court of Appeals (ruled 11 September 2001). Neglect has culminated over years. On 22 December 1986 Texas Christian University (TCU), a DOD contractor, directed that Army authorities discharge plaintiff (an Army Ranger second in command) from ROTC duty at TCU:

> **"He further asked that Major Boswell not be allowed to come back to campus at any time." (Army Colonel Bendele December 1986)**

In August of 1989, as causal effect from a relief and permanent change of duty officer evaluation performance report, plaintiff James Boswell was **unsuccessful** at an Amy retention board, was discharged, 12 April 1989, however, thanks to the Texas Veterans Commission opinion, March of 1993, plaintiff was successful at the Army Discharge Review Board:

> **"The applicant was rated beginning with an assertion that financial improprieties existed with the ROTC Cadet Fund Program "was victim of unfavorable actions". It is reasonable to assume that by revealing these irregularities, the applicant was at risk concerning the future of ROTC". Army Board (1993).**

And in 1994 the Pentagon refused to accept the Boards' findings. This was cause for concern for many leaders, internal and external, to DOD. As a consequence, in July of 1995, the Department of Defense Inspector General completed and released DOD Military Whistle Blower Investigation H94L56226017. The report summarizes the beginning as follows:

> **"On December 16, 1986, [illegible]. Boswell made 22 allegations to an Inspector General (IG) regarding misappropriation of cadet funds, sexual misconduct, by the instructor cadre, of a Reserve Training**

Corps ROTC detachment, and additional improprieties against his rating official. A subsequent IG investigation, on which a report was issued on April 10 1987 substantiated 9 of the allegations. (DOD whistle Blower report, July 1995)

Irrespective of the testimony that now alleges government fraud and conspiracy, the Whistle Blower investigation July 1995 provided impetus to the Army Board for Correction of Military Records (ABCMR) ruling May of 1997. This ruling expunged from the record unfavorable personnel actions, removed the officer evaluation report ending in December 1986 and declared the discharge from the Army void and to no effect. As partial restitution, the Department of the Army reinstated plaintiff to his former grade of Army Major, then involuntarily retired the applicant. Although clearly a favorable ruling by those who challenge government affairs, plaintiff appealed to the DOD Office of Hearings and Appeal and complained of failure to reinstate plaintiff **with seniority** and of the prejudice to the officer complete record and career illustrating the impact of missing reports, duty assignments, associated schools and awards. Direct promotion, due to the lack of a competitive file, was the method for the applicant to be made whole again, short of an award of damages from a Federal District Court. On 3 August 2000, DOHA denied the appeal. Critical requirements for promotion are present in the files of peers who did not have to indulge in whistle blower treatment and after effect. In 1999, Plaintiff filed a petition for agency review in the 5th Circuit Court of Appeals where the United States opined with two issues 1) that the petition was premature citing that the ABCMR action was not yet finalized and plaintiff had not exhausted administrative remedy and 2) the Federal Claims Court had exclusive remedy[1]. On 28 August 2000 plaintiff was

[1] Concerning 99-60398), "Boswell has petitioned this court for review of his final settlement of back active duty and retired pay, as a result of a decision by the Army Board for Correction of Military Records (ABCMR)... The law in this Circuit is clear. Failure of a plaintiff to exhaust intra

provided an agency monetary settlement in compliance with the Back Pay Act. On 6 December 2000 the ABCMR reopened the case and found additional error, and directed correction and that another promotion selection board convene. Effective in 1987, due to government interference, plaintiffs lost the family home. Shauna Mroski, Vanessa Boswell, and James Boswell were separated. We all lost University education benefits and on April 12 1989 plaintiffs lost all government benefits. Each Plaintiff suffered injury from breach of contract and intentional discrimination and retaliation for plaintiff complaining of program fraud and Title VI, VII, and IX violations. TCU service, in exchange for receipt for Federal Title IX title funds, was compromised by misconduct and **intentional discrimination** to cadets and employees. TCU employees and cadets who witnessed and reported the corruption were wrongfully and prematurely terminated. They include Plaintiff and Fant and Dunlap CR 18, Becker 393, Douglas 397, Tucker 499, Weiler 109. The Government's promise for a three year tour or for an education, which employeees and students relied on, was breached for regulatory, discriminate and arbitrary reasons. For plaintiff, duty assignment at Texas Christian University, Fort Worth Texas ended: The house valued at $ 90,000 and potential equity in this home and another home was lost. Takings due to regulatory reasons occurred. *Click 970 F.2d at 109*. The Veterans Administration repossessed the Fort Worth home in 1990. Federal Bankruptcy proceedings in 1991 caused loss of second home plaintiff had owned since 1977. Besides the economical injury, plaintiffs suffered from the government's intentional emotional injury and TORT, actions which are not within the jurisdiction

---

service administrative remedies deprives this court of jurisdiction . *Von Hoffburg v. Alexander, 615 F. 2d 633, 637-38 (5th Cir. 1980) and Hodges v. Callaway, 499 F.2d 417, 420 (5th Cir. 1974).* Accordingly, this court (Court of appeals) should dismiss the appeal until Boswell has exhausted administrative remedies." Court of Federal Claims has exclusive jurisdiction. ... Case must be filed with the U. S. Claims Court.

of the Claims court and were refused. On 5 September 2000 plaintiff filed a civil rights, WPA, and retaliation action in the Northern District Court of Texas. On or about 9 September 2000, noting the different jurisdiction requirements between the Federal District Court and Court of Federal Claims, Plaintiff filed a petition for review of final agency action in the Court of Federal Claims 00-CV-547C citing the *Federal Claims Case In Carla Thomas v U.S.A. N0 98-770C filed 31 July 2000.* Appellants have not been afforded a formal hearing either by the ABCMR or through court proceedings. The only hearing, incidentally, successful to petitioner, was before the Army Discharge Review Board traveling panel in Dallas. The U. S. Army Claims provided waiver to sue, 14 April 2000 but the district court ignored this right claiming Res Judicata. In 1992 plaintiff entered the Guard and again found contract fraud. Again the government breached a second contract and discriminated based on religion and retaliation. The EEOC provided waiver, 13 June 2000 in complaint T -0279-TX-A-04-99-L submitted 5 April 1999 through the Texas Guard but the District Court ignored this right, claiming again res judicata. The Office of Special Counsel case N0 MA 99-1931 and Merit Systems Protection Board's ruled lack of jurisdiction on plaintiff's civil service claim on 10 and 29 September 1999. Plaintiff submitted this unfair labor practice as part of the DC composite package. The Trial court refused to take notice of the agencies statutory obligation to hear violation of labor law and to consider all circumstances of fraud which had impact on the adverse personnel actions. Judicial proceedings would be moot had the ABCMR ruled as with *Diaz* (reinstatement with two grade seniority) or had Claims Court ruled the ABCMR ruling was arbitrary as with *Bond v United States N0 95-441C filed September 12, 2000.*

As of December 2000, appellant's involuntarily retirement is affirmed.

STATEMENT OF ANY FACTS

Plaintiffs plead Agency abuse for violating Congressional Intent "to make whistle blowers whole again", ignoring 29 U.S.C. 1109, 32 C.F.R. 562.4 (e) and 32 CFR 588.26 and section 1034 of Title 10 531. *Walker v United States N). 759 C Federal Court of Claims filed 7 April 1998, Angela Moris and Stacy Handley v Regents of the University of Colorado N0 96-1555, Zentgraf v Texas A & M , 492 F. Supp 265 (S.D. Tex 1980),* and for not recognizing the applicant had a duty to report violations of government contract agreements, civil rights, sexual misconduct, and misapplication of fiduciary property. Complainant accuses the Military Department and defendants with cover up and violation of federal and state retaliation law causing injury to the applicant and two daughters. In *Kindred v United States* the Court of Claims required the filing of a joint status report concerning damages. In Boswell eleven claims are listed Court Record (CR) page 3. Page 6, plaintiffs plead fraud and conspiracy[2], and establish jurisdiction in a Federal District Court. On page 31, plaintiffs define statutory relief. On 16 December 1986 Plaintiff complained of program fraud and racial discrimination. On 22 December 1986 defendant violated DOD agreement and unlawfully breached the contract and commenced regulatory taking actions without due process. Attributed to unlawful Government retaliatory interference for plaintiffs protected disclosure concerning program fraud, on April 12 1989 plaintiff's Army officer commission as an active duty regular Army Major was terminated. Plaintiff entered civil service as a GS 7 and as an Army Technician in the grade of **Sergeant** in November 1992. Starting in 1993, complainant provided the Texas Guard protected disclosures of program fraud. A DOD investigation May of 1995 concluded violation of plaintiffs due process and unlawful retaliation for the

---

[2] Conspiracies under **18 U.S.C. & 241 and 28 U.S.C. 1343.** Plaintiff shows evidence of the felonious crime of conspiracy and proves the two elements required to substantiate and justify damages. An agreement was executed. At least one of the co-conspirators performed an overt act independent of the agreement for the purpose of bringing about the object of the conspiracy.

discharge in 1989. In May 1997 the ABCMR expunged all records relating to the termination action from the University and declared the Army discharge 12 April 1989 as void. In civil service, in the Texas National Guard on 15 October 1998, plaintiffs Union President notified the agency of a failure to bargain in good faith concerning protected disclosures involving program fraud, pornography, and discrimination. On 22 October 1998 a court reporter factually reports the arrest of plaintiff's co-worker for solicitation of sex with a child and possession of boy nude photographs. In November 1998 the EEOC investigated discrimination based on religion and retaliation. On 23 March 1999 Senator Phil Gram's endorsed the conspirators' confession of witness intimidation and criminal connection showing Defendants bad faith concerning the program fraud on active duty. From January 2000 through September 2000 several witnesses provide affidavits which show that six black employees were victims of illegal discrimination. On 5 February 1999 Plaintiff received a retaliatory discharge from civil service. On 15 April 1999, the government released FOIA material describing the program fraud in 1993 and containing a citation where an Army Colonel (now General Bisson) was recommended for discipline for retaliation against plaintiff. On 28 August 2000 plaintiff received back pay. On 12 September 2000 the Federal Labor Relations Board (Dallas Region) cited the Texas National Guard and Army General Daniel James with an unfair labor practice - retaliation in the work place. On 6 December 2000, the ABCMR ruled favorably on a personnel issue and directed plaintiff be considered for promotion to Lieutenant Colonel. The ABCMR proffered that the termination from active duty was arbitrary and of no effect. Plaintiffs still grieve and seek damages. Army Lieutenant Colonel James Bright's confession, access to investigations, and discovery via FOIA will allow members of a reasonable Administrative or Judicial tribune to deliver justice. Prior to

---

Section 1985 of Title 42 provides for recovery of damages and for redress.

TCU and Army retaliatory conduct, appellant James Boswell was "an outstanding officer" and was offered a promotional job. Evaluations reflect he was rated as the best TCU ROTC instructor for fall of 1986. The discrimination began in 1986 one assignment earlier with Commander McCarthy in Germany. The treatment continued under Commander Stacy at TCU, and came to peak under Commander Parrish in the Texas National Guard in 1999. TCU, Army, and the Texas National Guard refused to grant Boswell employment and awards out of discriminatory animus directed toward his status for reporting violations of a government contract (protected disclosures) to the Agency Inspector General. Appellant reports of program fraud in each assignment and his opposition for sexual and racial harassment and superior misconduct in violation of the Uniform Code for Military Justice caused plaintiff to become member in the whistle blower protected class. This treatment continued in the Texas National Guard while appellant performed in a demotion status from Major to Sergeant for seven years while the ABCMR spent three years deciding the ruling. Meanwhile, Boswell received inhumane treatment and was victim of continued discrimination and retaliation (Payne affidavit addendum 3, page 51-56) sufficient for resignation on the basis of a constructive discharge. Plaintiff served as a Sergeant without promotion for seven years. This was unusual for a Command and General Staff graduate with a Masters in Public Administration. As for accountability, the government operated through four Commanders LTC McCarthy, LTC Stacy, LTC Parrish, and Colonel Bisson. Each commander reprised against petitioner after complainant disclosed wrongful activity to the authorities. In 1997 and 2000 the ABCMR failed to recognize the severity of retaliation and the ten year impact on the record and denied plaintiff direct promotion to Army Colonel. The non whistle blower received favorable promotion and education benefits, benefits Boswell was denied. From the beginning,

the government's withholding of discovery has prejudiced and delayed proceedings from 1986 -2001.

COURSE OF OTHER PROCEEDINGS AND DISPOSITION OF THE CASE

The United States Court of Appeals for the Federal Circuit in case 01-5096 has accepted the appeal to 00-CV-547 and appellants reply brief was mailed 15 November 2001. On 16 November 2001, the Federal Claims Court accepted plaintiff's Petition for Review 01-649C and has assigned it to arbitration. These cases have narrow jurisdiction and do not interfere with the outcome of the Boswell cases in the Federal District Circuit. Boswell II (USDC 4:00 CV-1526 Y) was filed 5 September 2000, in the Federal District Court of Texas on the hills of Boswell 1 USDC 4:98 CV- 168 Y filed 23 February 23 1998. Boswell I and Boswell II commences TORT and punitive damage action against said defendants. In Boswell 1, Boswell motioned to reopen the case due to evidence acquired through late FOIA and acquisition of the final agency order and two government letters to sue. Motion was denied. So a new suit was filed - Boswell II - alleges that Title VI of the ***Civil Rights Act of 1964, 42 U.S.C. 2000d***, prohibits any "program or activity receiving Federal financial assistance" from "subject[ing] to discrimination" any person "on the ground of race, color, or national origin." Individuals alleging violations of these prohibitions have a private right of action against persons receiving federal financial assistance and their officials. See ***Pushkin* v. *Regents of the Univ. of Colo.*, 658 F.2d 1372, 1381 (10th Cir. 1981); see also *Franklin* v. *Gwinnett County Pub. Sch.*, 503 U.S. 60, 76 (1992); *Cannon* v. *University of Chicago*, 441 U.S. 677, 705-706 (1979).** By dismissing with prejudice Boswell I and Boswell 11, the court shielded the state actors. Yet the state shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of Title IX of the Education Amendments of 1972 [20 U.S.C. 1681 et seq.]and title VI of the

Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance. According to the allegations of the complaint, defendants, Texas Christian University and the Adjutant General of Texas received federal financial assistance. (see addendum 3, pg 57-58) Plaintiffs allege that, in distributing this money, along with state funds, defendants use a formula that discriminates on the basis of race, national origin, and disability without any substantial legitimate justification. Government Defendants were successful in dismissal of Boswell 1's initial pleadings citing that the alleged constitutional violations do not provide waivers of immunity, the whistle blower statute does not waive sovereign immunity, Title Vll does not apply to active duty military personnel, that statute of limitations have run, that the tort claim is barred as a matter of law because Boswell has not filed an administrative claim, that the court lacks jurisdiction because it exceeds the $ 10,000 limit, and that promotion is nonjustifiable. TCU defendants motioned for summary and final judgment citing inapplicability of Texas Whistle Blower Act, 10 U.S.C. section 1034, 29 U.S.C. 2615, and 42 U.S.C. 1981 and 2000e-5 because plaintiff was not employee of TCU and was not a member of a minority race, and that TCU did not falsely imprison Plaintiff. Because of the new evidence of conspiracy (addendum 3, page 10-36) Boswell plead that Boswell 1 be reopened. Boswell II (was assigned to Judge Means in Boswell 1), a new case was filed, with documentation for exhausting all administrative remedy against a more complete, accurate, and a more comprehensive list and **different actors**, but it too was dismissed claiming res judicata. On the same day, 11 September 2001 Boswell 1 and Boswell 11 embanc considerations were denied. Boswell 1 has resulted in request for EnBanc appeal N0 00 10698 (addendum 1) . Boswell 11 has resulted in request for EnBanc appeal N0 00-11360 (addendum 2).

SUMMARY OF THE ARGUMENT

Appellants make nine arguments. Public Law 100-456 codified at section 1034 of Title 10 and common law and the equity standards set forth in public law 103-353 (108 stat. 3158) paragraph 4314 govern. The Court may rely on Federal discrimination law, or Texas retaliation law (Title II or Texas Whistle Blower Act of 1983 WPA) to "provide an entire remedy," including "restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records or model 28 U.S.C. § 1491(a)(2). *McGILL v USA, 97-769C filed November 16, 1998.* (*Skinner v. United States, 594 F.2d 824, 219 Ct. Cl. 322 (1979); Sanders v. United States, 594 F.2d 804, 219 Ct. Cl. 285 (1979); Burd v. United States, 19 Ct. Cl. 515 (1990); Casey v. United States, 8 Ct. Cl. 234 (1985)), restoration to military office,, Yee v. United States, 512 F.2d 1383, 206 Ct. Cl. 388 (1975); Murphy v. United States, 16 Cl. Ct. 385 (1989) Gant v. United States, 18 Cl. Ct. 442 (1989*); Federal District Courts rely on the Federal Court of Appeal Circuit on such matters as promotions while the court of Claims relies on the District Court for Tort, Discrimination and Retaliation Claims in Violations of the WPA. *Mitchell v. United States, 930 F.2d 893, 896 (Fed. Cir. 1991).* Contract victims requests incidental or collateral relief that Congress intended incident of and collateral to" a money judgment. 28 U.S.C. § 1491(a)(2) (1994). *Bobula v. United States Department of Justice, 970 F.2d 854, 859 (Fed. Cir. 1992). 37 U.S.C. § 204 (1994).* If an officer of the Armed Services is wrongfully discharged, the right to pay conferred by § 204 continues and serves as the basis for Tucker Act jurisdiction. In a concise statement of facts, Plaintiffs provide violation of the contractual arrangement and denial of constitutional civil rights. Reassignment to another installation had substantial causal effect. First, effective 22 December 1986, plaintiffs' were denied "the full and equal enjoyment of goods, services, facilities, privileges, advantages, or

accommodation of TCU, a place of public accommodation. This Army/TCU directive remains in effect as of the filing of the petition (December 2001). Second, on April 12 1989, the government deviated from the terms of the contract by taking a money entitlement and this continued until August 29 2000. The compensation for ten years in back pay was without interest and is considered as unequal treatment compared to civilian and federal civil service counterparts. Continued employment on active duty and civil service was a substantive right, which is enforceable against the United States for money damages **(Tucker Act under 37 U.S.C. 204).** Loss includes a career profession, numerous associated takings, causal effect; e.g. loss in privileges and medical benefits and impact to daughters' economic and social status in the community. The court may provide ancillary relief for wrongful discharge. The 3rd breech of contract came as a failure of the Agency to make plaintiff and family members whole again. Because of the Pentagon's protected bias, this prejudice carried over to the Board. The result was an incomplete officer file when compared to others: The special selection boards denied plaintiff promotion on two consecutive occasions. The ABCMR retired plaintiff at the same grade of Major, the grade plaintiff had already obtained prior to the unconstitutional 5th amendment taking. Plaintiff contested the lack of back pay from the ranks of Lieutenant Colonel and Colonel. *Mitchell v. United States, 930 F.2d 893, 896 (Fed. Cir. 1991).* The independent statute the ABCMR and DOD Inspector General cite for authorizing back pay and reinstatement are Title 10 U.S.C. 1552, DoD Directive 1332.28, Directive 5505.5, Public Law 100-456 codified at section 1034 of Title 10 and 102-190 implemented by DoD Directive 7056.60. Judgment is appropriate out of equity on breech of Department of Army Policy and DoD contract agreement and pursuant to Congressional mandate for and Texas law for liquidated and unliquidated damages. Army policy coupled with Title 10 jurisdictional statute warrants waiver of sovereign

immunity which could fairly be interpreted as mandating recovery of compensation from the government e. g. making plaintiffs whole again. The ABCMR ruling on the contract and taking claim is not depositive. Takings occurred as a result of exercising the First Amendment right to free speech - an action adjudicated in the District Court. Plaintiff has no recourse with the Military Department or under the CSRA. *Kennedy v. United States, 5 Cl. Ct. 792, 793 (1984)* in the claims court for discrimination. State Defendant failed to reasonably apprise plaintiff of beneficiary rights and obligations and taking of $ 34,000 due to loss of dual status pay. Concerning the $3,000 from the Veterans Affairs debt, the VA agrees (addendum 3, pg 67) to relinquish on grounds for equity. Had plaintiff been apprised he would loose his civil service career and the $ 34,000, he would have chose another career in the private sector. This court may find that as with an ERISA complainant "ambiguities in the contract are to be resolved against the drafter, in the employees favor". *Tabb Lakes, Ltd. v. United States, 10 F.3d 796, 802-03 (Fed. Cir. 1993).* This civil service contract was cut short from its longevity. Redress shows Constitution violation and arbitrary and capricious actions. This renders the Agency as suspect for intentional infliction of emotional harm, civil rights violations, and for retaliation, issues for the District Court to decide. The Army failed to follow regulatory procedures by failing to seek an advisory opinion from the Texas Guard and National Guard Bureau as was accomplished in *Diaz*. In *Cunningham v U.S.A. No. 97-499C, (Filed January 12, 1998),* the ABCMR ruling was remanded to respond "Was the error in plaintiff's OMPF "material" or "harmless," such that plaintiff was prejudiced?" A blank file is inherently detrimental and prejudicial. The Agency had obligation to do more *Sanders v. United States*, 594 F.2d 804, 810 (Ct. Cl. 1979) in a case of involuntary discharge or wrongful termination. *Adkins v. United States, 68 F.3d 1317, 1321 (Fed. Cir. 1996).* Jurisdiction with respect to contracts extends to express or implied-in-fact contracts

and is not based upon contracts implied-in-law. *Hercules Inc. v. United States, -- U.S. --, 116 S. Ct. 981, 985 (1996)(citing Sutton v. United States, 256 U.S. 575, 581 (1921).* An agreement implied in fact is 'founded upon a meeting of minds from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding. *Baltimore & Ohio R. Co. v. United States, 261 U.S. 592, 597, 43 S. Ct. 425, 426-427, 67 L. Ed. 816 (1923*). The following elements were present: "a mutual intent to contract including offer, acceptance, and consideration; and authority on the part of the government representative who entered or ratified the agreement to bind the United States in contract. *Trauma Serv. Group v. United States, 104 F.3d 1321, 1325 (Fed. Cir. 1997).* Family planning is based on trust of contract. The Takings Clause of the Fifth Amendment states: "nor shall private property (property interest) be taken for public use, without just compensation." U.S. Const. amend. V. Employment labor laws and contracts are violated. The District Court has jurisdiction.

ARGUMENT AND AUTHORITIES

Standard for Review. The United States Supreme Court must affirm the Appeal Court's decision unless it is (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (2) obtained without adherence to procedures required by law, rule, or regulation; or (3) unsupported by substantial evidence. ***5 U.S.C. § 7703(c) (1994).*** Boswell witnessed disparate treatment of women and blacks in the Guard and at the University. On appeal, disputes arose; yet defendants do not dispute retaliation. Once an employee establishes a prima facie case of retaliation under the WPA, the burden shifts to the agency to prove by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected disclosure. ***5 U.S.C. § 1221(e) (1994); Carr v. Soc. Sec. Admin., 185 F.3d 1318, 1322 (Fed. Cir. 1999).*** The Court has obligation to use the framework for analyzing a retaliation claim as used in the employment discrimination context of

Sherrod v. American Airlines, Inc., 132 F.3d 1112, 1122 (5th Cir. 1998). Petitioner established a prima facie case of unlawful retaliation on two accounts. Reporting the sexual impropriety concerning sexual intercourse in the ROTC environment and pornography in civil service Texas Guard context involved supervisors. The burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the retaliation and adverse employment action. Boswell contends that the Northern District Court of Texas and 5th Circuit Court of Appeals erred (1) in accepting Defendants arguments and not requiring defendants to meet the burden (2) failure to acknowledge investigations which document lack of due process (3) and by not granting motions for recusal and discovery. Abuse of discretion should be reviewed, as was in *Rubenstein*, under a deferential abuse of discretion standard. See *Geiserman v. MacDonald, 893 F.2d 787, 789 (5th Cir.1990); Hodges v. United States, 597 F.2d 1014, 1018 (5th Cir.1979).* Boswell, as Professor Rubinstein, maintains error that law requires broader discovery into Army-Texas Guard wide tenure and promotion decisions. Boswell relies on *Travis v. Bd. of Regents of Univ. of Texas, 122 F.3d 259 (5th Cir. 1997) and Duke v. University of Texas at El Paso, 729 F.2d 994 (5th Cir. 1984).* In *Travis*, as in Boswell, the plaintiff alleged sex-discrimination. Boswell alleges Title VI, Title VII, and Title IX discrimination in significant government contracts.

Argument I. Whether Defendants presented clear and convincing evidence to rebut Boswell's prima facie case of retaliation with respect to performance appraisals, promotion and career status pursuant to Federal and Texas Whistle Blower Protection Act? Appellants claim is for corrective action under the Texas Whistle Blower Statute and ***Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (1989) (codified in scattered sections of 5 and 10 U.S.C.).*** On five separate occasions, Boswell reported protected disclosures to a Defendant or

investigative authority. Each time, Defendant responded with reprisal. Protected disclosures included violations of Uniform Code to Military Justice, Agency and University Policy as detailed in Army Directives and the University Handbook for Faculty and University Staff and grievance policy, Title Vl, Title VII and Title IX. Appellant witnessed command abuse and appellant felt the health, welfare, and safety of students, soldiers and employees were in danger of loosing basic fundamental constitutional rights. As example in the Fort Worth public facility in Texas National Guard, appellant felt that children could be exposed to the sex videos watched by plaintiff's supervisor, an Army Captain, during duty hours or to unnecessary exposure to a co worker suspected sexual impropriety (subsequently convicted of a sexual felonious crime. Boswell experienced hostility and adverse personnel actions after each EO, Union, or IG complaint. Defendant Secretary of the Army claims to have voided/corrected the record on three occasions (evaluations ending in Dec 1986, Apr 1989 and the discharge from the Army action) but overlooks the overall impact to appellant's career. Prior to becoming a whistle blower, Boswell received excellent performance appraisals starting in 1972 where Boswell received a distinguished hand shake for becoming honor graduate from now CNN Military analyst, General David Grange (then Colonel Commandant of the U.S. Army Ranger School). The rating on active duty which Boswell received before becoming a whistle blower, was marked by promote to Lieutenant Colonel and select for Battalion Command. The DOD IG reports the evaluations were near identical and sufficient for the Department of the Army to promote the service member to the grade of Army Major in 1984. Likewise, performance was sufficient for the Texas Guard to select Boswell as runner up 2nd Brigade **Sergeant** NCO of the Year in 1994. TCU wrongfully terminated Boswell from an ROTC assignment ending in a relief for cause efficiency report and wrongful termination with a career ending evaluation in April 1989 had degradation of an

award. After a year in the Guard, the Adjutant General's Chief of Staff (Koehlor, CR 190) writes "He swallowed his pride and accepted the challenge". The Texas State Command Sergeant Major writes committed to professionalism; own integrity would not allow to look away from wrong doing. (CR 187). Pending administrative remedy and appeal, the Texas Agency defendant violated the Technicians civil service contract by denying Boswell an ending performance rating, reneging on a promise of job selection as a Major, and by termination from civilian employment without redress to the EEOC and WPA complaints. Boswell received an estimated 13 support letters from the Guard CR 182 - 190 and two offers to testify in federal court. By not ruling as in **Stanley Larson v Department of the Army, United States Court of Appeals for the Federal Circuit, 00-3041, August 14, 2001,** the Appeals court abused discretion. In Larson, the ruling cited "Because the Board's decision is based on an incomplete and inaccurate review of the record, we vacate and remand". In Larson, remanded on appeal, the Administrative Judge ultimately ruled in favor of the Army, finding that the Army had rebutted this prima facie case by presenting clear and convincing evidence that it would have taken the personnel actions in the absence of the protected disclosures. But the Appeals' Court agreed with Larson that the AJ's conclusion is based on an erroneous and incomplete evaluation of the record. By 5th circuit ruling, Boswell was required by Texas WPA law to exhaust remedy. (see **Breax v. City of Garland v.205F.3d 5th Cir 2000)** Boswell filed a WPA action with the Military and with the Office of Special Counsel requesting corrective action under the ***Whistleblower Protection Act ("WPA"). 103 Stat. 16 (1989) (codified in scattered sections of 5 U.S.C. and section 1034.*** The Administrative Judge ("AJ") assigned to Boswell's case held lack of jurisdiction (addendum 3, 65-66), that Boswell was an employee of a non-federal entity. In December 2000, the Army's grant of back pay and reinstatement inferences that the burden of establishing a prima facie

case of retaliation under the Military WPA was met. Specifically, the board found that due process was violated and that Boswell's protected disclosures were a contributing factor in the challenged personnel actions but failed to address the Texas Guard claim. In compliance with the Texas Whistle Blower law and the 30 day rule for exhausting administrative remedy (see addendum 3, page 59 right to sue letter, dated 23 Feb 2000) Boswell filed the Texas WPA action in the 67th District Court, Tarrant County Court NO 067-182444-00, 24 March 2000. Attorney for the State of Texas moved the action to Federal Court 400-CV- 1440e and it was dismissed without prejudice on 5 September 2000, and refiled on the same day (adding federal respondents and federal statutes) as 400-CV-1526. In Boswell ll appellants motioned for recusal and cited abuse in discretion and perceived prejudice in applying the provisions of the Soldier and Sailors Act of 1950 in Boswell I. The court ignores testimony of pretext on motive that individuals who ultimately caused the removal from service, communicated adverse employee threats that if appellant continued to file grievance with authorities such as the IG and EEOC, he would ultimately pay the price. Testimony is corroborated through the ten witnesses addendum 3, pages 10-56 who show motive to retaliate. In **Larson**, timing was noted:

> **"It seems unlikely that McBride could have completed his investigation and informed Larson as to his conclusions so early on the same morning that he first learned of Larson's concerns".**

Similarly, in Boswell it appears unlikely that the Federal Judge would rule on the very same day a suspense was due unless the suspense was prefabricated. Plaintiffs Army supervisor, Sam Kinser, addendum 3 page 47 explains to the court appellant's sickness and cause for a one day extension to respond to summary judgment. Appellant obtained opposing attorney consent and faxed the court a letter, then followed up by filing the response the following day. The Court did not consider the

response. In Larson the Appeals Court concluded that the AJ's findings for "no motive to retaliate", was based on an erroneous evaluations of the evidence. Evidence in Larson and Boswell lends credibility to Appellant's contention that the investigation and ultimate approval by the investigators occurred after the hiring authority had proposed/directed suspending the retaliators. In Larson a witness attests to the hostility. In Boswell witnesses (addendum 3, pages 10-58) Payne, Weiler, Lynn, Kinser, Bice, HayHurst, Bright, Fant, Mroski, Darnell describe the hostility defendants exhibited toward Boswell. Credibility findings are ordinarily entitled to great weight. **See Hambsch v. Dep't of Treas., 796 F.2d 430, 436 (Fed. Cir. 1986).** Here, the Trial and 5th Circuit Appeal decisions contain no findings with respect to the credibility of these witnesses. The court fails to mention any of this testimony in the decision. Under these circumstances, this court cannot conclude that the Judge properly rejected this evidence. In light of these factual errors and the Judge's incomplete treatment of the testimony in the record, this court cannot accept the determination that justice is served. Appellants provide clear and convincing evidence that Boswell's adverse actions and the harm to family members was because of causal effect from the protected disclosure. This determination is supported by substantial evidence. ***5 U.S.C. § 7703(c) (1994) and by military experts Marine Colonel Ezzell, Army Colonel Parnell, Army General Wetzel and Lieutenant Colonels Bight and Berry, and a Navy Captain.*** This honorable Court should vacate the Appeal Court's ruling and remand for further proceedings. In Larson the Appeal Court noted " The WPA prohibits the "tak[ing] or fail[ure] to take . . . a personnel action with respect to any employee . . ." **5 U.S.C. § 2302 (b)(8) (1994).** A performance appraisal is a personnel action under the WPA. **5 U.S.C. § 2302(a)(2)(A)(viii) (1994).** The reduction in his rating to "success" was an adverse action that would have a negative effect on his potential for advancement".

Defendants failure to take specific requested actions provides motive for retaliation. The Army points that credibility determinations are virtually unreviewable see **Hambsch, 796 F.2d at 436**; but the Appeal Court in Larson states: "Nevertheless, we may fully consider such determinations and assess the proper weight to assign to such determinations in light of the other evidence of record. See ***Grubka v. Dep't of Treasury, 858 F.2d 1570, 1574 (Fed. Cir. 1988); Wright v. U.S. Postal Serv., 183 F.3d 1328, 1334 (Fed. Cir. 1999)".*** The case in ***Hillen v. Dept of the Army, 35 M.S.P.R. 453 (1987)*** requires a judge to explicitly consider certain factors when making a credibility consideration, including the character and demeanor of the witness and any inconsistencies in testimony. Aside from problems with the Trial court's assessment of Boswell and witness testimony, the documentary evidence casts considerable doubt on assertions that they were not influenced by Boswell's protected disclosures. The DOD IG whistle blower investigations released in 1995 and 1998 and Board actions of 1993, 1997, and 2000 draw conclusions favorable to Boswell. The record contains no plausible explanation for the adverse personnel actions, aside from Boswell's allegations of retaliation.

Argument II. 42 U.S.C. 2000d-7 is a valid exercise of Congress's power under ***section 5 of the fourteenth amendment*** to remove Eleventh amendment immunity to suits under ***Title VI.*** In the government's intervening brief in ***Robinson v. United States of America to the United States Court of Appeal for the 10th Circuit Nos 00-3315 and 00-3332,*** the government argues that Section 2000d-7 can also be upheld as a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment to abrogate States' Eleventh Amendment immunity. In ***Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996)**, the Supreme Court articulated a two-part test to determine whether Congress has properly abrogated the States' Eleventh Amendment immunity. Congress has unequivocally expressed its intent to abrogate the immunity;

and second, Congress has acted pursuant to a valid exercise of power. When Congress enacted Section 2000d-7 in 1986, it expressly invoked its power under the Fourteenth Amendment. Congress unquestionably enacted ***42 U.S.C. § 2000d-7*** with the "intent" to invoke the Fourteenth Amendment's congressional enforcement power. Military service members render complaints. Where does the power come from to combat fraudulent concealment, to rectify the injury and to award damages? In upholding the abrogation in the ***Railroad Revitalization and Regulatory Reform Act as valid Section 5 legislation in*** **Union Pacific Railroad Co. *v.* Utah,** ***198 F.3d 1201, 1209 (10th Cir. 1999),*** 10th Circuit made clear that "congressional action may be upheld under § 5. Congress intended to use federal spending as the trigger for coverage under Title VI. That Congress is using the "carrot" of federal funds to assure non-discrimination does not remove these provisions from the ambit of Fourteenth Amendment legislation. Congress's power to enforce the Fourteenth Amendment, while not unlimited, is broad. ***City of Boerne*** **v.** ***Flores*****, 521 U.S. 507, 517 (1997).** Congress's power "to enforce" the Amendment "includes the authority **both to remedy and to deter violation of rights guaranteed** thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." **Kimel *v.* Florida Bd. of Regents,** ***120 S. Ct. 631, 644 (2000)***. Therefore, the central inquiry is "Do Defendants including the Secretary of the Defense and the Secretary of the Army have authority and appropriate means **of deterring or remedying constitutional violations** and given the circumstances of this case was these authorities responsive?" Authorities over military service members have the authority, to design and prevent what in Boerne is described as unconstitutional behavior." *Id.* at 645 (quoting **City of Boerne,** ***521 U.S. at 532).*** Although "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to

discern. Congress must have wide latitude in determining where it lies." ***Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 629 (1999)**. "It is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." ***City of Boerne*, 521 U.S. at 536.** So long as there is a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end," enforcement legislation is appropriate within the meaning of the Fourteenth Amendment. *Id.* at 520. Reasonable accommodations by any definition of the Equal Protection Clause does not include the activity appellant complained about in the Inspector General Report concerning the Defendant's treatment toward Afro -Americans Fant, Dunlap, Hobbs, and Brown. As matter of pretext the Investigation results came after termination of plaintiff and the ordering of plaintiff for Psychiatric Evaluation. Thus, investigation bias requires questioning as the Federal Circuit decided **Larson v USA 00-3041 Aug 14, 2001, page 7.** Appellants show punishment - a never ending ten year battle - lack of compliance ending in $ 500 total of consecutive sanctions (See last page in addendum 1 and 2 enbanc appeals. There is no question that States have engaged in a widespread pattern of unconstitutional race discrimination. The Supreme Court has recognized that the "history of racial discrimination in this country is undeniable." **McKleskey *v.* Kemp, *481 U.S. 279, 298 (1987).*** Thus, a statute like Title VI that prohibits race discrimination by States is quintessential legislation to enforce the Equal Protection Clause. See, *e.g.*, ***Ex parte Virginia*, 100 U.S. (10 Otto) 339 (1879) (upholding criminal statute prohibiting exclusion of blacks from juries as valid Section 5 legislation)** . By default, the Court of Appeals must have agreed with the Defendants that plaintiff failed to state a claim and that appellant failed to meet the four conditions required to revoke res judicata (appellees brief pages 6-9). The court

ruling is inconsistent with a previous ruling upholding Section 2000d-7's removal of Eleventh Amendment immunity for Title VI claims. See ***Lesage* v. *Texas*, 158 F.3d 213, 217 (5th Cir. 1998), rev'd and remanded on other grounds, 528 U.S. 18 (1999)**; see also ***Johnson* v. *University of Cincinnati*, 215 F.3d 561, 571 (6th Cir.) (upholding abrogation for race discrimination claim under Title VII of the Civil Rights Act), cert. denied, 121 S. Ct. 657 (2000)**; ***In re Employment Discrimination Litigation Against Alabama*, 198 F.3d 1305, 1321-1322 (11th Cir. 1999) (same)**. Considering the Navy Investigator's finding of retaliation (addendum 3 page 13), and plaintiff's testimony denying legal support, DD 5505.5 governs. TCU defendant admits to receipt of federal funds (addendum 3, pg 58). Texas agency do not deny that it is "receiving" the funds. This is all that the statute requires.

Argument III. 42 U.S.C. 2000d-7 validly removes eleventh amendment immunity to suits under Title VI. Section 2000d-7 of Title 42 provides that a "State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of ***Title VI of the Civil Rights Act of 1964***." The Supreme Court has characterized Section 2000d-7 as meeting its requirement that Congress unambiguously express in the text of the statute its intent to remove the Eleventh Amendment bar to private suits against States in federal court. **See *Lane* v. *Peña*, 518 U.S. 187, 198 (1996).** When defendants elected to accept federal funds, this removed Eleventh Amendment immunity from such claims pursuant to its authority under Section 5 of the Fourteenth Amendment. ***Section 2000d-7*** Is A Clear Statement That Accepting Federal Financial Assistance Would Constitute A Waiver To Private Suits Brought Under ***Title VI***. Congress recognized that the Supreme Court's decision in ***Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234 (1985)** had implications for Title VI and ***Title IX of the Education Amendments***, each of which applied to those "program[s] or activit[ies] receiving

Federal financial assistance." See S. Rep. No. 388, 99th Cong., 2d Sess. 28 (1986); 131 Cong. Rec. 22,346 (1985) (Sen. Cranston); see also ***United States Dep't of Transp.* v. *Paralyzed Veterans of Am.*, 477 U.S. 597, 605 (1986).** Under Title VI and Title IX Congress enters into an arrangement in the nature of a contract with the recipients of the funds: the recipient's acceptance of the funds triggers coverage under the nondiscrimination provision. On signing the bill into law, President Reagan similarly explained that the Act "subjects States, as a condition of their receipt of Federal financial assistance, to suits for violation of Federal laws prohibiting discrimination on the basis of handicap, race, age, or sex to the same extent as any other public or **private entities**." ***22 Weekly Comp. Pres. Doc. 1421 (Oct. 27, 1986), reprinted in 1986 U.S.C.C.A.N. 3554.*** This suggest that a Private University as in the instant concerning defendant Board of Trustees, Texas Christian University that Section 2000d-7 thus puts States on notice that part of the "contract" for receiving federal funds is the requirement that each agency receiving funds consent to suit in federal court for alleged violations of Title VI. The entire package (nondiscrimination obligation and removal of Eleventh Amendment immunity) is conditioned on the agency accepting the federal financial assistance. The Fourth Circuit, after an extensive analysis of the text and structure of the Act, held in ***Litman* v. *George Mason University*, *186 F.3d 544, 554 (1999), cert. denied, 120 S. Ct. 1220 (2000),*** that "Congress succeeded in its effort to codify a clear, unambiguous, and unequivocal condition of waiver of Eleventh Amendment immunity in ***42 U.S.C. § 2000d-7(a)(1)***." Every court to address this issue has agreed with *Litman* that the Section 2000d-7 language clearly manifests an intent to condition receipt of federal financial assistance on consent to waive Eleventh Amendment immunity. See **Jim C. *v.* Arkansas Dep't of Educ.,** ***235 F.3d 1079, 1081-1082 (8th Cir. 2000) (en banc) (Section 504);*** **Stanley *v.* Litscher,** ***213 F.3d 340, 344 (7th Cir. 2000) (Section 504);*** **Pederson *v.***

Louisiana State Univ., *213 F.3d 858, 875-876 (5th Cir. 2000) (Title IX);* **Sandoval** *v.* **Hagan**, *197 F.3d 484, 493-494 (11th Cir. 1999) (Title VI), cert. granted* on other grounds, *121 S. Ct. 28 (2000) (No. 99-1908);* **Clark** *v.* **California**, *123 F.3d 1267, 1271 (9th Cir. 1997) (Section 504), cert. denied, 524 U.S. 937 (1998); see also* **Board of Educ.** *v.* **Kelly E.**, *207 F.3d 931, 935 (7th Cir.) (addressing same language in 20 U.S.C. 1403), cert. denied, 121 S. Ct. 70 (2000);* **Little Rock Sch. Dist.** *v.* **Mauney**, *183 F.3d 816, 831-832 (8th Cir. 1999) (same).* *Congress Has Authority To Condition The Receipt Of Federal Financial Assistance On The State Waiving Its Eleventh Amendment Immunity* Section 2000d-7 is a valid exercise of Congress's power under the ***Spending Clause, Art. I, § 8, Cl. 1,*** to prescribe conditions for States which voluntarily accept federal financial assistance. As the Supreme Court recently reaffirmed, when it elects to disburse federal funds, "Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and acceptance of the funds entails an agreement to the actions." ***College Sav. Bank*** **v.** ***Florida Prepaid Postsecondary Educ. Expense Bd.*****, 527 U.S. 666, 686 (1999).** Defendants Texas Christian University and the Texas National Guard agency ultimately was free to reject both the conditions and the funding, no matter how hard that choice may be. In ***Alden*** **v.** ***Maine*****, 527 U.S. 706, 755 (1999),** the Court specifically noted that "the Federal Government [does not] lack the authority or means to seek the States' voluntary consent to private suits. Cf. ***South Dakota*** **v.** ***Dole*****, 483 U.S. 203 (1987)."** Similarly, in ***College Savings Bank***, the Court reaffirmed the holding of ***Petty*** **v.** ***Tennessee-Missouri Bridge Commission*****, 359 U.S. 275 (1959),** where the Court held that Congress could condition the exercise of one of its Article I powers (the approval of interstate compacts) on the States' agreement to waive their Eleventh Amendment immunity from suit. 527 U.S. at 686. Congress also has

delegated power under the Commerce Clause to regulate "otherwise lawful activity". Then the central issue is based on the appellants accounts of retaliation, why weren't the government and state employees punished? Defendants' attempts to distinguish this case as one which has already been tried is not persuasive. Appellants were not made aware that the black employee and witness to the investigation was missing until LTC Bright drew the criminal connection (see addendum 3, pg 11-12). After review of the Hayhurst addendum 3, page 21-24, it provides reason for either a hate or terrorist violation. State law "authorize[s] and empower[s]" the Board of Education to apply for federal funds and "to do all things necessary to comply with and carry out any such federal law or the rules and regulations promulgated thereunder by the federal government or any agency thereof." This certainly does not mean intimidation to the potentially most damaging witness. The statutes themselves, "state educational institutions to contract with the United States Department of Education to apply for and receive federal funds and to make the funds available under existing [federal] law, rules, or regulations" on their face make clear that agencies receiving federal financial assistance are prohibited from discriminating. See ***School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 286 n.15 (1987)**. Appellants supplied the agreement signed between Texas Christian University and the Department of the Army. (addendum 3, pages 2-8) The statutes do not force States to administer federal programs - they simply impose conditions on those state agencies that accept federal financial assistance. This case sought administrative remedy and as late as the agency final agency action, December 2000, the agency was unable to recognize fault in the assessment by partisan officials. Rather than to admit error, the government has lodged a fraudulent concealment campaign and adopted a legal strategy which attempts to negate the premise that there is no federal statute of limitations for civil rights actions brought pursuant to section 1983.

Argument IV. A court abuses discretion when new evidence of compelling nature warrants a new trial, leave to supplement the record, and justification to vacate trial court summary and final judgment. This argument is adopted and articulated at addendum 1, pg 10 - 11. The ABCMR 1997 ruling makes no mention to a hate crime, the disappearance of a witness in the Army's proceedings. Secretary of the Army Defendant cites the BCMR action as "permissive". But when program fraud and Rico assertions rise to the level effecting the Agency impartiality, Court precedence is remand or reversal. Sovereign immunity does not preclude an independent action of contract violation for fraud upon the court and for violation of regulatory policy. DoD 5505.5 requires investigation. Defendants violated ***DOD Directive number 5505., 5 Subject the implementation of the fraud program Civil Remedies Act of 1986, October 1986, Title V, U.S.C. code chapters 33, 43,51, 53, Subchapter III, Title 31 U.S.C. 3716, 3729, 3730, 3803, 3804, 3805, 3806, 3808, and Title 18 U.S.C. section 287 Federal Rules of Criminal Procedure, rule 6(e)***. The applicability of DD 5505.5 para 2 is "to the Military departments, to DOD components, to the IG". It is a DoD Policy to redress fraud. Para 4.3 states the Secretaries of the Military Departments shall establish procedures for caring out duties and responsibilities as authority head and 4.3.3 delegate duties as appropriate.

Argument V. The doctrine of administrative remedy offsets the doctrine of Res Judicata when the Army Claims Agency and EEOC subsequently grants consent by letter to suit and final agency action is deemed finalized. This ruling directs involuntary retirement - an action not heard by any court. The District Court and 5th Circuit overlooked controlling principle of law concerning "just compensation" for damages pertaining to retaliatory, whistle blower, constitution violations of the First, Forth, Fifth, Sixth, and Thirteenth, Fourteenth and equal protection amendment. The *doctrine of foreseeability* should have alerted defendant to economical and emotional injuries. 18 U.S.C. cites that to launder money is prohibited by 371 and 18 U.S.C. 1956 (a) (1). The Agency must proceed impartially and investigate injury caused by wrongful discharge and a fifth amendment taking recoupment of civil service pay ($ 34,521), loss of civil service salary and position) and breech of contract claims. The Texas Guard must consider 42 U.S.C. § 1981 and title VII, 42 U.S.C. § 2000e violations under the framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The Agency has not articulated a legitimate, non-discriminatory reason for the wrongful discharge. The record establishes pretext. In compliance with Fed R. Civ.

P. 56(c) and Rule 56(e) appellants go beyond the pleadings to show there is a genuine issue for trial." *Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). Shackelford v. Deloitte & Touche, LLP, 190 F.3d 398, 404 (5th Cir. 1999).* Major Daniel's affidavit obtained through investigation is direct evidence of the senior leadership's intent: "I hope this puts a lid on it finally: He (Boswell) needs to be put out of the system". (CR page 233) In Reeves, *530 U.S. at 143-46;* Russell, *235 F.3d at 229 & n.19,* the Supreme Court faulted the decision in *Reeves* for failing to accord proper weight to the plaintiff's substantial evidence of pretext. Reeves, *530 U.S. at 149*. Comments relate to the protected class is proximate in time to the termination 5 February 1999 and was made by an individual with authority over the employment decision at issue; and relates to the employment decision at issue.'" *Krystek v. Univ. of S. Miss., 164 F.3d 251, 256 (5th Cir. 1999) (quoting Brown, 82 F.3d at 655).* This argument is adopted and articulated on addendum 2 page 8- 14.

Argument VI. Military service members are entitled to exceptions to Feres Doctrine when the doctrine fundamentally conflicts with the statutes as example Title VI civil rights statutes and injury from protected Disclosures under the WPA. This argument is adopted and articulated at addendum 2, page 11-12. **Does *Feres* preclude WPA and Discrimination claims?** Is this a case where application of the Feres Doctrine is fundamentally unfair? *Feres* warrants assessment because of its harm to society. Plaintiff experienced an entrenched dysfunctional management system. On 19 June 2001, an Internet cite contains 1127 members, mostly warn down Veterans, who signed a petition expressing sentiments and injury about *Feres.* To the average juryman and tax payer, these injustices zoom straight for the heart. Its bothersome to compensate for miserable defects in troubled agencies and University programs protected by systemic flaws - in investigations and BCMR administrative proceedings and takings whether it be an "arm" or "house". The Feres doctrine prohibits accountability. Courts cite incident to service and *Feres.* Complainants lack remedy in state court because state defendants are shielded by immunity and also *Feres.* The Court Denies motions for Discovery and to supplement the record with additional findings of the ABCMR Army Regulation 15-185 ABCMR states the ABCMR is not an investigating body that it begins each case with the presumption of regularity. Once a petitioner challenges the regularity with affidavits and DOD reports and records, the Agency must resolve disputed facts and issues of fact and policy *Essenberg, 988 S.W. 2d at 189.* Review of the most recent case ABCMR case AR20000045750 25 July 2000 shows injustice when the Government's word takes precedent over

individual affidavits. Failure to fact find prejudices remedy and provides even greater justification for discovery. Failure to acquire advisory opinions from the National Guard Bureau as was accomplished in the DIAZ case AC9505686 published 19 February 1997 is error. Acting Director Karl Schneider directed complainant Diaz be promoted by two grades. In May of 1997 Mr. Schneider denied Boswell's promotion against the recommendation of a three star Army General and a Department of Army Inspector General Lieutenant Colonel. Petitioner complains of disparate and bias treatment. DOD Inspector General recommended both Diaz and Boswell for relief. The evidence in both proceedings show violation of law. A Texas Guard technician complainant has no remedy with the MSPB and OSC only through the BCMR or through federal courts. Failure of the court to supplement the record requires the filing of a second, additional action. Senator Sam Nunn states "Mr. Boswell's case merits careful review in light of the strong public policy against whistle blower retaliation" page 158 in the court record. This would appear counter to the proponents of the Feres doctrine. Discovery is relevant to a determination concerning whether the defendant had engaged in discrimination. The Court in *Duke* reasoned that failure to allow discovery into the records of professors university-wide to substantiate a gender-discrimination claim constituted an abuse of discretion. As with *Rubinstein,* Boswell's title at the University was Associate Professor. Boswell reflects several genuine issues of material fact. *Fed. R. Civ. P. 56(c).* Boswell makes the required showing. *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973).* Boswell was a member of a protected class; According to three Army General officers, he was qualified for the benefit or promotion he sought; was denied these benefits and such denial constitutes an adverse employment decision; and that the adverse employment decision and correction was differentially applied to plaintiff. *Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Ward v. Bechtel Corp., 102 F.3d 199, 202 (5th Cir. 1997).* The court is aware of the Supreme Court's recent admonition that plaintiffs need not always present evidence above and beyond their prima facie case and pretext, *Reeves v. Sanderson Plumbing Products, Inc., 2000 WL 743663, 5. Brown v. CSC Logic, Inc., 82 F.3d 651, 655 (5th Cir. 1996),* Whistle blower reprisal was proximate in time to the complained-of adverse employment decision and the proximate failure to receive raises or promotions. The inferences point so strongly and overwhelmingly in favor of appellants that reasonable men could not arrive at a contrary verdict. Judgment as a matter of law is proper and should be granted. Appellants do not have to prove that his "protected conduct

was the sole factor in motivating. *Long, 88 F.3d at 305.* Discrimination was a second factor. The employer engaged in illegal discrimination or retaliation (*Hicks, 509 U.S. at 511).* As substantiated by the Bright, Fant, Bice, Lynn, Kinser, HayHurst, Mroski, and Payne affidavits. Even without discovery, by a preponderance of the evidence, appellants establish that filing the grievance was a motivating factor in the TCU, Army, and Texas National Guard decisions. Had plaintiff supported his supervisors in the appearance of unethical and illegal contract operations, plaintiff, like peers, may have secured a successful military career. In deposition, taken pursuant to the Army's dismissal action, Colonel Parnell from the Office of the Chief of Staff of the Army, stated clearly the lack of General Officer accountability. The evidence of retaliation could be no more direct. Appellants respectfully challenge the courts denial of interrogatories, admissions and for production of materials. But for retaliation, the adverse employment action would not have occurred. *Long v. Eastfield College, 88 F.3d 300, 305 n.4 (5th Cir. 1996). McDaniel v. Temple Indep. Sch. Dist., 770 F.2d 1340, 1346 (5th Cir.1985). 42 U.S.C. §2000e-2(m) (Section 107).* Plaintiffs show motive. In the wake of *Price Waterhouse v. Hopkins, 490 U.S. 228 (1989),* plaintiffs must prove that but for the discriminatory intent, the adverse employment decision would not have been made. Discovery allows examination of good faith and impartiality. Discovery is the tool to ascertain whether the court's response to questions is in the affirmative: "Do you find by a **preponderance of the evidence** the following: that the ABCMR acted with malice or with reckless indifference to federally protected rights of James Boswell? That James Boswell's filing of a breach of contract and taking complaint to an investigative authority was a motivating factor in the Army and University's decision to remove applicant from ROTC duty in 1986? That Boswell's filing of a complaint was a motivating factor in the Army's decision: to remove applicant from the Army in 1989? to deny reinstatement with seniority in 1997? to deny reinstatement with seniority in 2000? To deny civil service reinstatement to an equitable grade of GS -7. The evidence supports a finding that the malfeasing agent served in a "managerial capacity" and committed the wrong while "acting in the scope of employment." *Kolstad, 119 S.Ct. at 2127.* The employer's good faith efforts in compliance with their internal policy is absent this case. Whether the conspiracy to rid Boswell from duty rose to the ABCMR executive level is an issue in dispute. *(Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 188 F.3d 278 5th Cir. 1999).* The DOD Whistle blower Inspector General was well within its purview in 1995 to so find, that "Mr. Boswell's whistle blower actions are not in

dispute" and to recommend action through the ABCMR. Had the ABCMR honored the Texas Veterans Commission and General Officer statement requesting direct promotion to a higher grade, this case would be resolved. Now this court must contend with setting precedent and consider means for equitable compensation in lost wages, punitive, special and liquidated damages. In *Rubinstein*, he was entitled to an award of punitive and emotional damages. Under three factors, the degree of reprehensibility of the defendants' conduct demonstrates ill-will. *Deffenbaugh-Williams, 156 F.3d at 597*. The DOD contractor expressly acknowledges an undertaking of contract mismanagement. The wrongful discharge demonstrates a high degree of reprehensibility. ABCMR reasonableness and disparity enters the constitutional calculus. The back pay is prospective relief to correct a wrong previously committed, while special damages and promotion with seniority is properly the tool used to correct the retrospective harm. Given the illegal conduct by the conspirators, retaliators, and malicious or reckless indifference to Boswell's federal and state constitutional rights, the ABCMR compensation is short of Due Process. Reinstatement to a position at TCU is appropriate due to testimony concerning the emotional state resulting from the unreasonable behavior. Defendant's unlawful influence, lack of formal hearing, denial to interview key witnesses represent systemic flaws to impartial adjudication. The domino effect is on trust, readiness, recruiting, retention. Defendants insulated themselves and the ultimate decision maker's action is merely a "rubber stamp" for the subordinate's recommendation. *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 226-27 (5th Cir. 2001). The employee demonstrates that others had influence or leverage over the official decision maker by imputing discriminatory attitudes to the formal decision maker." *Id.* at 226; Willis v. Marion County Auditor's Office, *118 F.3d 542, 547 (7th Cir. 1997)* Under the circumstances of the case, the ABCMR acted as the 'cat's paw' for Army Generals and the Secretary of the Army accused of wrong doing. This case must fall under the "rubber stamp" exception. Plaintiff's suit certainly disadvantaged plaintiff.

Argument VII. Whether the court abused discretion for dismissal on grounds of lack of jurisdiction and grounds that the claim is time barred. The Claims court violates legal precedent that when a party fails to disclose evidence and obstructs justice and is a participant to fraud, statute of limitation and affirmative defenses are tolled/waived. From the settlement date 28 August 2000, the six year statute of limitations still runs. From the financial disputes arising from federal wrongful termination 12 April 1989 and 5 February 1999, statutes are tolled. The Claims

Court ordered restoration to military office, *(Skinner, Sanders, Yee v. United States, 512 F.2d 1383, 206 Ct. Cl. 388 (1975); Murphy v. United States, 16 Cl. Ct. 385 (1989))*, placement in correct retirement status, *(Gant v. United States, 18 Cl. Ct. 442 (1989); Casey)* and correction of military records, *(Skinner, Sanders, Yee, Burd, Gant, Murphy, Casey).* The Agency after receiving Senators Grams concern and endorsement of the Bright statement had knowledge of the conspiracy to harm the Boswell plaintiffs which would allow a prudent person to charge another with dishonesty. *USA v Fed INS NO 99- 35881 (9th Cir Aug 7, 2001)* Looking at other circuits, dismissal on grounds for statute of limitations is inconsistent with *Asher Rubinstein versus Administrators of the Tulane Educational Fund 5th Cir 98-30777, July 6, 2000.* Professor Rubinstein asserted retaliatory claims and the trial court dismissed this suit on statute of limitations. On appeal, Rubenstein was awarded compensatory and punitive damages, and a raise as an equitable remedy for the retaliatory act taken by Tulane. Statute of Limitation ruling conflicts with the Doctrine of Administrative Remedy and the U.S. 9th Circuit Court of Appeals, *Couveau v American Airlines 9955032, CV-97-06731-JSL, July 17, 2000.* The Colonels' citation for unlawful refusal of legal assistance hindered an adequate defense as well as the government constraint of ten years worth of back pay. The FLRB found Agency retaliation.[3] Yet, witnesses still feared retaliation disadvantaging plaintiff. Withholding of discovery had the effect of concealing fraud and explanation for unreasonable search and seizure of evidence. U.S. defendants urged administrative exhaustion. See footnote 1. Appellant complied. Expunge of all records related to discharge confirms use of remedy. It tolls. The economic harm was not realized until the government rendered settlement, 28 August 2000. The pro se litigants may have not have presented the claim to attorney standards, but claims were submitted sufficiently for the Court to grant relief. Petitioner in the 2000 ABCMR action plead fraud and conspiracy. Significant facts, absent from the ABCMR decision in May 1997, came after this suit was filed. Framing of the complaint is crucial[4]. The final Army settlement, 6 December 2000 serves as notice of constructive discharge and notice of additional prejudice concerning a performance evaluation rendered on April 12 1989.

---

[3] The FLRB required Defendant Army General, Major General Daniel James to place notice on public bulletin boards. The notice implied that victim of retaliation could raise a claim.

[4] Although a plaintiff may seek leave to file a supplemental pleading to assert a new claim based on actionable conduct which the defendant engaged in after a lawsuit is commenced, see Fed. R.

ABCMR ruling 2000 addresses additional claims[5]. LTC Bright's confession statement provided the argument for formal barriers and interference with the family and violation of specific statutes[6]. Abuse of discretion is shown by examining the four factors in *Griggs.* [7] Defendants failed "to offer a plausible explanation to the several material facts in dispute". This has caused a substantial delay and expense to appellants. Fraudulent actions can now be easily reconstructed. Constitutional issues are fairly joined. This court has experience for resolve - particularly when facts and affidavits reflect intentional discrimination. As a matter of law, appellants suffered due to regulatory reasons. This raises a fact issue which must be sent to a jury. *Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct 2548, 2552 (1986).* The Appeals Court failed to place particular reliance on the testimony and misevaluated the evidence for causation.

Argument VIII. Whether the court ruled properly on whether appellants have stated a claim for which relief could be granted is questioned. It is a dispute over lawful state award of damages, over employability, civil service back pay and transfer to another civil service position in lieu of civil service termination. But the case is different than as in *Roberson v. Principi Fed Cir May 29 2001.* Agency failure and role in conspiracy over Whistle Blower Claims is at issue. The Federal Court has said that federal whistle blowers are not entitled to non pecuniary damages winning claims against them for their disclosures *(Bohic v. Department of Agricult* *25 April 2000 Fed Court of Appeals).* A year later the circuit found that whistle blower p*tections do not apply to "dual status" technicians those who must main membership in a National Guard to keep their Federal positions *(Singleton v. Merit Systems Protection Board 25 Apr 2001).* The American Federation of Government Employees and the National Treasury Employees Union testified as to the support of house Representative Bill 169 but rejects methodology for payments for retaliation out of the same budge pot for the inherent agency pressure to obstruct justice, and resist payment. Yet the head of the Office of Special Counsel, Elaine Kaplan, testifying on proposed Senate

---

Civ. P. 15(c), he is not required to do so, *see First Jersey Sec., 101 F.3d at 1464; see also Manning, 953 F.2d at 1360*.

[5] In the first ABCMR action, it is unfair to preclude plaintiff from a second action in which he was disabled from presenting in the first.'") (*Restatement (2nd) of Judgments § 26(1)(c) cmt. c (1982)).*

[6] Appellants have sufficient contacts to satisfy the Due Process Clause of the Fourteenth Amendment. *Chaiken v. VV Publ'g Corp., No. 95-9301, 1997 WL 403511, 2d Cir. July 21, 1997.*

[7] Whether leave to amend is appropriate, the court considers "presence of any of four factors: bad faith, undue delay, prejudice to the opposing party, and/or futility." *Griggs, 170 F.3d at 880.*

legislation S-995 that protections for federal employees who blow the whistle on fraud and abuse are being whittled away by erroneous interpretations of law. The District Court misapplied law and the evidence concerning plaintiffs financial dispute. *(Callahan v. United States 00-538 C).* Plaintiffs prove that the government has concealed its actions yet the nature of the conspiracy was inherently knowable at the time the injury occurred. District Court assertion that plaintiff has not developed the complaint is incorrect. Failing to oversee the remedy responsibility over retaliation claims is abuse of discretion in light of two separate Whistle Blower Investigator opinions of retaliation; Secretarial Authority ruling (removal was "arbitrary" and discharge is declared void and to no effect); cause and injury; intervening events; admission to the conspiracy; sworn affidavits implicating and pointing to a DOD contractor. While the Federal Circuit has experience with these claims with other Boards *Mintzmeyer v Department of Interior 95- 3665 May 16 1996 and the* Claims Court has authority to ensure the ABCMR exercises partiality, neither has jurisdiction over Title VI, Title VII, Title IX and retaliation claims. The Final agency ruling appears to give little weight to the Director of Department of the Office of Army Equal Opportunity. Direct promotion was a remedy for retaliation for engaging in activities protected by Whistle Blower Law and Title VII. Failure of each defendant to influence this remedy, favorably, is viewed as additional reprisal. The employee opposition of contract practice overlaps with violation of other statutes - 42 U.S.C. § 2000e-3(a). Petitioner adduces sufficient evidence that would permit a reasonable trier of fact to find that the proffered reason is a pretext for retaliation and demonstrated that the adverse employment action would not have occurred "but for" the protected activity. Appeal Court afford a high degree of deference to employers in their hiring and promotion decisions. In order to be probative on the issue of retaliation, "the qualifications [must be] so widely **disparate** that no reasonable employer would have made the same decision. General officers are alleged to have played a role in the violation of 18 U.S.C., 42 U.S.C. and Title VI, Title VII, Title IX violations, the Racketeer Influenced and Corrupt Organizations Act, and Texas Title II and the Texas Whistle Blower Act. Major General Daniel James was cited. Army Inspector General, General Hale was convicted. It was unlawful for any person employed by or associated with any enterprise to conduct or participate in the conduct of such enterprises affairs through a pattern of unlawful activity, 18 U.S.C. 1961 et seq., 1962(c*). Cedric Kusedric Kushiner Promotions LTD. v. King No. 00549 2nd Cir April 18, 2001*, reversed and remanded by *the US Supreme court June 11, 2001 Pp.28.219 F.3d*

115 holding that a corporate employee conducts affairs within the scope, or beyond the scope of corporate authority through its directors, officers, and agents. Plaintiff explains the three phase conspiracy and the existence of separate entities. Based on Congressional leader intervention on two accounts, Senator Sam Nunn in 1996 and Senator Phil Gramm in March of 1999, the Secretary of the Army was factually aware of illegal operations, cover up, and reprisal. The ABCMR violated Congressional Intent by: 1) not reaching a position that appellant should be made whole again i.e. promotion with seniority 2) not recommending equitable, punitive or special damages and in the absence - correct the injustice 3) failure to levy accountability on the perpetrators construed to violate Rico 1962(c)s and 1961(3). (4) The District Court abused its discretion by failing to apply similarly pretexts to the instant case as other circuits applied. (*United States v. Bestfoods, 524 U.S. 51, 6162).* The ABCMR has failed to protect a legitimate enterprise and immunized upper management and lower rung participants from liability. This has allowed unlawful acts to victimize the agency. *United States v. Turkette, 452 U.S. 576, 591.* The Court must challenged this forbidden pattern as is accomplished in other circuits. *Brannon v. Boatmens First Nat. Bank of Okla., 153 F.3d 1144, 1148, n. 4 (CA10 1998); Richmond v. Nationwide Cassel L. P., 52 F.3d 640, 647 (CA7 1995); Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., 46 F.3d 258, 265, 269 (CA3 1995); Sever v. Alaska Pulp Corp., 978 F.2d 1529, 1534 (CA9 1992).* RICO seeks to prevent victimization using a corporation for criminal purposes e.g. protecting officials responsible for program fraud. *National Organization for Women, Inc. v. Scheidler, 510 U.S. 249, 259 (1994). Reves v. Ernst & Young, 507 U.S. 170, 185 (1993).* Had the Court reacted properly on the plaintiff's violation of the False Claims Act ("FCA") as was accomplished in *Riley v St. Lukes Episcopla Hospital No. 97-20948, 5th cir, May 25, 2001* conspiracy to defraud the United States Treasury in violation of the statute may have come to light. In Riley, Nurse Riley sued eight defendants. More than a billion dollars have been recovered under the FCA since 1987. *Anna Mae Walsh Burke, Qui Tam: Blowing the Whistle for Uncle Sam, 21 Nova L. Rev. 869, 871 (1997).* Justice Scalia found relators filing suit under the FCA have Article III standing. *Stevens, 529 U.S. at 848.* The Take Care Clause states that the Executive "shall take Care that the Laws be faithfully executed." *U.S. Const. art. II, § 3*. It gives the Executive the power to enforce the laws, *Springer v. Philippine Islands, 277 U.S. 189, 202 (1928);* such power includes the authority "to investigate and litigate offenses against the United States." But *Feres* protects the government from litigation: The relator, in Boswell, plead fraud with

particularity in accordance with FRCP Rule 9(b). *Vermont Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 848, 120 S. Ct. 1858, 146 L. Ed. 2d 836 (2000). Russell, 193 F.3d at 306.* When trust, integrity, and respect for honor, duty, and country is high, patriotism is high. When the government partakes in corruption, reprisal and retaliation, resources will be high to compensate for the inequities and fall out. Defendant inadequacy to address these relator issues is a factual and genuine issue in dispute. While a dissenting judge may cite that Possees may have been appropriate in the Wild West, where they were deputized by the an executive officer--the Sheriff--Congress has no business forming them now, the DOD employee oath requires all employees help agencies achieve control. The DOJ data indicates that in the first nine months of 2000, the government recovered $1.2 billion in cases in which it had intervened and $913,957 in those in which it had not. The agency fails to support Article II of the Constitution. Plaintiff has standing. The Court misinterpreted vicarious liability and congressional intent to make plaintiffs whole again. The typical government civil service position and military promotion criteria considers scores from the applicant's past performance review, awards received, and potential for success. By failing to provide complainant an annual rating from 1998 thru 1999, defendant successfully disabled appellant's from future employability in civil service.

Argument IX. Whether the court recognized a conflict of interest is crucial. In the highly publicized case summer 2000 Supreme Court justices recused themselves. The adjudicator whether it be judicial or military tribune must meet test of impartiality. The public's confidence in Agency actions coincides with the level of citizen cooperation necessary to the success of any investigation. The average citizen wants an effective Agency and they want to help - and correct incompetence and abuse. So, with that in mind, the court must applaud the 100 American citizens for their cooperation and confidence and coming to the aid of plaintiff. But the Agency has failed to take the recommendations. But it is the agency at-large that determine its' success and this can be achieved only by a positive dynamic between the 'rank and file' and management. When Agency conspiracy is alleged, the upper-tiers of management have interest especially when the Agency is faulted for wrong doing and any penalty is taken from the budget. Here lies a conflict of interest. Notice the time delay and conduct of investigations. History is mankind's best teacher. The Agency's problems center around four distinct elements: Discipline, Responsibility, Accountability, and Assessment. Foot note 9 reveals the DOD magnitude. One case after another has surfaced to

illustrate this internal weakness, and the consequences cannot be understated. It now takes inordinate amounts of time to resolve even the smallest mistakes or corruption. Discipline is anything but swift and sure. Promotion of Army Colonel James Bisson to Brigadier General in the Texas Guard undermine discipline considering the Navy Captain (Roy Miller) finding at CR pg 13: "The matter of retaliation against SGT Boswell should be referred to the CG, 49 AD for disciplinary action". Instead this General improperly influenced the discharge action. Sluggish management disadvantages the BCMR applicant and corrodes the process. The BCMR's must not be allowed to dodge this vital responsibility. If management mis-performs and chooses not to properly discipline, the accountability factor is side swept. Confidence in upper authority is dramatically lost. Instead of enjoying a high morale and positive espre de corps, those in the system cling to the incompetent, the dishonest, and the corrupt. Corruption, while small, inevitably leads to larger corruption. There needs to be an objective assessment made on a regular basis. The Supreme Court is equipped to carry this maintenance tasks. This case has shown the reality that when military service members expose contract discrimination and troubled waters, the member may expect that upper management, protected by *Feres*, will manipulate the system to damage to others to secure their careers. Previous warriors Senator Sam Nunn CR 158, Three Army Generals (CR 419, 420, 421) including Lieutenant General Robert Wetzel CR 492, and Colonel Parnell (CR 492) tried intervention. If the Court were to attack the Military Department's complacency and arrogance, this increase integrity will assuredly produce reason to turn the tide as reported by the Washington Times May 31, 2001, "Army failed to meet (recruiting) expectations in March, April, and May, 2001". This issues are best reviewed by examining the Supreme Court's *West Department of Veteran Affairs v Gibson 14 June 1999 N0 98-238* concluding that *42 U.S.C. & section 2000e 16 (c)* empowers court to entertain an action by a complaint still aggrieved after final action and the Texas Appeals Court's decision in *Texas Dept. Of Human Resources v. Green No 3-92-059-CV (Tex. App.Austin 1993, n.w.h)*[8] and *Breax v City of Garland v.205 F.3d 5th Cir 2000* (exhausting administrative remedy). There is without doubt constitutional injury and reason for

[8]*The Whistleblower Act seeks to protect the individual employee against the collective acts of the agency, the bureaucracy, the institution, the system that retaliates, and does not seek to protect the employee solely against the acts of an individual supervisor. The act unambiguously waves the governmental immunity from suit and from liability of governmental suits seeking redress for*

trial. *Jackson v Van Winkle, 660 S.W. 2d 807, 809* Appeal measures are necessitated to protect[9] service members from abuse. A departure is necessary from the usual practices[10] which has placed this Nation in quandary. Whistle blowers loose. Application of the status quo is unappealing. Maintaining judicial uniformity leaves a bad taste because of the impact of inherent unfairness, injustices and obsolete doctrine. Even the courts are reluctant to change. Misconduct and claims of fraud are not suppose to be barred from suit by any principles including *Feres* and R*es Judicata.* Conspiracy is an exceptional and important issue not only from Senator Nunn's whistle blower perspective (16 September 1996), but from the perspective of due process, breech of contract, and governmental regulatory interference. The Appeals Court's decision is inconsistent with its own rulings in *Pederson*, with *Bond* and other circuits.[11] The district court is expected to hear the claims, not abandon them. Officials may not take students earned money. Officials may not kill the contract violation messenger and still reap secure employment and annually, $ 6,000,000 in Title IX funds. Outrageous conduct included arbitrary cadet disenrollment; silence; law firm threat; lack of due process; psychiatric evaluation; reputation damage; and termination. This rises to the level for Court consideration of Agency and contractor impartiality. Gratitude goes to the Marine (court record page 157, addendum 3, pages 13-14), deposition of an Army Colonel Chief of Staff (489-

---

retaliation. Texas Dept. of Human Services v. Green, NO. 3-92-059-CV, (Tex. App.—Austin, 1993, n.w.h.), at pg. 8 of the opinion.

[9] An antidote to denial is confession. Admitting guilt will go along way to recruitment, retention, and readiness. Consider financial costs for the shortcomings - the bite to the tax payer wallet, advertisement and incentives to compensate for "Americans" cynicism and question of BCMR practice of fairness, equity, and justice. Why are we spinning our wheels and losing productivity? Just as there is a correlation between child hood and outcome, there appears to be nexus in cause and effect between damage to a military person and EX-military damage to society e.g. whether homeless or a hardened criminal. While peace is the antidote to retaliation, ABCMR commitment is required to improving Armed Services accountability.

[10] DOD IG web site, http://www.dodig.osd.mil/audit/reports/index.html results of the audits from the IG to Congress: Whistle Blower statistics April thru Sep 2000 (the latest publish report) DOD IG auditors realized $ 201 million in monetory benefits 191 indictments 152 convictions; 253 ongoing investigations senior official misconduct; 20 cases were closed concerning allegations of improper referrals for mental health; 297 cases of military whistle blower reprisal.

[11] *Pederson v. Louisana Stat Univ. 201F. 3d 388, 406 (5th cir. 2000); Coveau v. American Airlines 9955032, CV-97-06731-JSL, July 17,2000* and the continuing violation doctrine and title VII protection against retaliatory discrimination as described in *Felder D.C UAL Corporation 9th cir appeal 98-3551 and Supreme Court decisons in Bulington Industries v Ellerth 118S.Ct 2257 (1998) and Faragher v. City of Boca Raton, 118 S.Ct. 2275 (1998).*

497)[12], the female cadet victim (page 192-3, addendum 3, pages 33-34), the Union President (229), the Court reporter (page 302), a POW (505), Chaplains, Pastors, School Administrators, a County Judge, Senator Gram. Each affidavit contributes - negates the District Court ruling - begs to make America better. For the accountant, the pay off check to TCU (court record page 159) may be more persuasive. What methodology protects an impressionable recruit or cadet - certainly not resistance to change and failure to acknowledge impropriety in the work place? This case gained force because of the goodness in people. If the victimization of the African Americans and females in this case is allowed to stand without judicial accountability, a responsibility is attached - our American heritage and history. Escaping retaliation consequences is sufficient to award judgment as matter of law. The leadership of the Army, the recruit, the cadet, our future leaders need this court's input to show a caring interest in the affairs of all service members similarly to all citizens.

REASONS FOR ALLOWANCE FOR WRIT

SUMMARY AND CONCLUSION

Our nation has just witnessed that our firemen, police and military force are precious commodities. We must proper and work toward readiness, recruiting, and retention. When service members witness dilution, inconsistency, corruption the first thought is escape from being a victim, fear, disappointment, and frustration. The result is that many of them move on. We have taken the role of the National Police Force to confront all terrorism. A twelve year old in America knows no difference when she is so frightened, escorted by two men in Military uniform, placed into a military car not knowing where she will be taken. Take less than a minute and read her statement

---

[12] They had a sizable pot of money, and now this cadet fund was used to pay air fare and other expenses . . . Come on! So when I read that, that caused me to read a lot deeper. I think it was a bunch of crap. I think it was put together in a way that would maintain the image of every thing being in accordance with absolutely simon-pure propriety at the University". Army Chief of Staff

(appendix, addendum 3, page 31 and 32). Senator Sam Nunn's statement affirms the appropriate rationale why the Supreme Court intervention in this case is necessary: As the Senator states:

"in light of the strong public policy against whistle blower retaliation".

Equally spoken by words of wisdom from an American Hero, Mr. Tom Lancaster, he writes as if it is a story:

> **On a deer hunt ... unprepared ... lost in high mountains ... rugged canyon I will always remember Jim Boswell. I appreciate his courage and ability to help us survive and give credit to the Army, airborne, ... Ranger training. Jim needs help. I respectfully request that you and the readers of this affidavit do whatever is in your influence and authority to correct this injustice. We need members with strong values and convictions, like Jim, in our services ...** (CR page 505).

Why the writ? My first thought is for Veterans, like my dad in the nursing home who served in WW II and the Korean War. Then I would say for my daughters. They were terribly wronged. Then the seven cadets and cadre who were deprived of a career. But most of all for Staff Sergeant Dunlap, an afro American and his family. As appellant may have been instrumental in saving the life of Mr. Lancaster, SSG Dunlap testified for plaintiff. For some mystically unknown and unexplained reason, he shortly after testifying disappeared and supposedly abandon his family and country after he had served eighteen years, two years short of retirement. The four who knew him Bright, Fant, Lynn, HayHurst, Bice each provide affidavits (Appendix addendum 3). We allege there is more than meets the eye. No body remembers Dunlap and or his family. Appellant served in five Army Divisions, traveled immensely, and attended five Universities in Texas. Since 1998 appellant has studied legal cases on each of the Circuit's web sites. It appears as it applies from a legal perspective and Title VI, the courts in Texas require emphasis and catch up with the rest of the nation. As a matter of law, plaintiffs pled their case. Appellants suffered. Modeled from federal statutes,

Texas Education Code, Sec 61.001 purpose is to provide leadership and coordination for institutions and governing boards - be an advocate ... of sufficient authority ... to the benefit of the students ... and ... to the citizens to the end that Texas may achieve excellence for college education for its youth. Review the victims of this ordeal. Too many were hurt. The Texas Veterans Commission took an interest. The pattern of racial discrimination was discovered by a predecessor CSM Fant. He was terminated before plaintiff. Government interest in eradicating racial discrimination substantially outweighs whatever burden denial" ***etc Bob Jones University v United States, 461 U.S. 574***. United States consented to be sued and the consent is interpreted strictly. *United States v. Sherwood , 312 U.S. 584, 586 , 590 (1941)*. Expert witnesses, such as Army Inspector General LTC Luther Berry, now testify while Lieutenant General Robert Wetzel remains firm for reinstatement with seniority. University defendant's denial that plaintiff even raised contract service discrimination charge is clearly refuted and one of the material issues. Appeal consideration weighs heavily for obstruction of justice and fraud upon the court. Evidence was capable for a favorable ruling to plaintiffs and award for special damages and compensation and now judgment as a matter of law *Nelson v. City of Irvine, 143 F.3d 1196, 1200 (9th Cir. 1998).* Defendant's interpretation of 32 CFR & 562.4 (e), the vicarious liability and premise they need no legal justification to retaliatory discharge a DoD employee misses the mark. If successful, it will be ironic that an Army Ranger who went from Major to Sergeant influenced the course of legal change and history for military service members. Isn't this what makes America so great? Each of us can make a difference. We must have patience and allow the system to work and make America stronger as time moves on.

Prayer: This Court grant judgment as a matter of law, and in the alternative, remand to the 5th Circuit Court of Appeals consistent with the publication of this opinion.

Respectfully Submitted,

Jim Boswell
Pro Se
414 Morrison Drive
Euless TX 76039
817 358 9911
JBosRanger@aol.com

Vanessa Boswell
Pro Se
414 Morrison Drive
Euless TX 76039
817 358 9911

Shauna Mroski
Pro Se
414 Morrison Dr.
Euless TX 76039
817 358 9911

STATEMENT CONCERNING INSTRUCTIONS AND VIRUSES

This brief is prepared on Windows 7.0 in Microsoft Word. It may be viewed on any program compatible with this computer language.

This is to certify the absence of computer viruses. The software used to ensure that the brief in virus free is McAfee October 1998.

James D. Boswell

Certificate of Compliance

This writ is submitted in accordance with and is in compliance with rule 33.2.

There are 40 pages including 13, 958 words; 38 paragraphs, 1052 lines typed on 12/14 pitch; Microsoft word 5.0

James D. Boswell
Pro Se

CERTIFICATE OF PROOF OF SERVICE IN THE SUPREME COURT OF THE UNITED TATES in

JAMES D. BOSWELL, Individually and on behalf of all others similarly situated; VANESSA LACE BOSWELL, Individually and on behalf of all others similarly situated; SHAUNA MROSKI, Individually and on behalf of all others similarly situated

Plaintiffs-Appellants-Petitoner

v.

BOARD OF TRUSTEES TEXAS CHRISTIAN UNIVERSITY (individual members (in their official capacities only); GEORGE BUSH, Governor, individual and official capacity; DANIEL JAMES, Major General, Adjutant General of Texas, LOUIS CALDERA, Secretary of the Army, National Guard Bureau Agency,

Defendants-Appellees-Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS FORT WORTH

USDC No. 4:00 - CV-1526-Y, Fifth Circuit N0 00-11360 and USDC No. 4:98-CV-168-Y No-00-10698

I do declare this writ of certiorari and appendix to the writ is prepared in accordance with rule 33.2. In accordance with the service rules Supreme Court rule 29 (3) for writs prepared under 33.2, one copy of the writ is served to each of the parties listed on the petition through their attorney of record. The writ and appendix was served by certified priority mail, return receipt requested to Texas Christian University Defendants is Richard De Berry, McDonald and Sanders, 1300 Continental Plaza, 777 Main Street, Ft Worth Texas 76102 (817 336 8651) and for United States Defendants is Wayne Hughes, Jr. Assistant United States Attorney, 801 Cherry St. Suite 1700, Ft Worth Tx 76102-6897 (817 252 5200), and for Texas Government employees, Mr. Peter J. Strelitz, Capitol Station, PO Box 12548, Austin Texas, 78711-2548 (512 463 2120) on this date 7 December 2001. I declare under the penalty of perjury that the forgoing is true.

James Boswell

James Douglas Boswell, Pro Se
414 Morrison Dr.
Euless TX 76039
817 358 9911 fax 817 358 0291

CERTIFICATE OF PROOF OF SERVICE IN THE SUPREME COURT OF THE UNITED TATES in

JAMES D. BOSWELL, Individually and on behalf of all others similarly situated; VANESSA LACE BOSWELL, Individually and on behalf of all others similarly situated; SHAUNA MROSKI, Individually and on behalf of all others similarly situated

Plaintiffs-Appellants-Petitoner

v.

BOARD OF TRUSTEES TEXAS CHRISTIAN UNIVERSITY (individual members (in their official capacities only); GEORGE BUSH, Governor, individual and official capacity; DANIEL JAMES, Major General, Adjutant General of Texas, LOUIS CALDERA, Secretary of the Army, National Guard Bureau Agency,

Defendants-Appellees-Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS FORT WORTH

USDC No. 4:00 - CV-1526-Y, Fifth Circuit N0 00-11360 and USDC No. 4:98-CV-168-Y No-00-10698

I do declare this Appendix to writ of certiorari was served by certified priority mail, return receipt requested to Texas Christian University Defendants is Richard De Berry, McDonald and Sanders, 1300 Continental Plaza, 777 Main Street, Ft Worth Texas 76102 (817 336 8651) and for United States Defendants is Wayne Hughes, Jr. Assistant United States Attorney, 801 Cherry St. Suite 1700, Ft Worth Tx 76102-6897 (817 252 5200), and for Texas Government employees, Mr. Peter J. Strelitz, Capitol Station, PO Box 12548, Austin Texas, 78711-2548 (512 463 2120) on this date 7 December 2001. I declare under the penalty of perjury that the forgoing is true.

James Boswell

James Douglas Boswell, Pro Se
414 Morrison Dr.
Euless TX 76039
817 358 9911 fax 817 358 0291